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**Working Paper**

Neither 'public' nor 'private', 'national' nor 'international':  
transnational corporate governance from a legal pluralist  
perspective

TranState Working Papers, No. 128

**Provided in Cooperation with:**

University of Bremen, Collaborative Research Center 597: Transformations of the State

*Suggested Citation:* Zumbansen, Peer (2010) : Neither 'public' nor 'private', 'national' nor 'international': transnational corporate governance from a legal pluralist perspective, TranState Working Papers, No. 128, Universität Bremen, Collaborative Research Center 597 - Transformations of the State, Bremen

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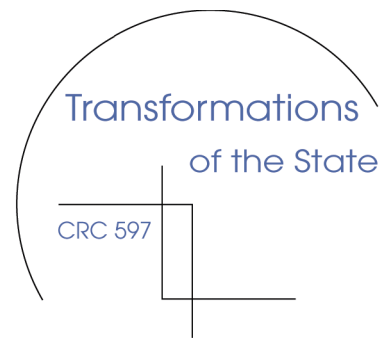
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# TranState Working Papers

NEITHER 'PUBLIC' NOR 'PRIVATE',  
'NATIONAL' NOR 'INTERNATIONAL':  
TRANSNATIONAL CORPORATE  
GOVERNANCE FROM A LEGAL  
PLURALIST PERSPECTIVE

PEER ZUMBANSEN

No. 128

Universität Bremen • University of Bremen  
Jacobs Universität Bremen • Jacobs University Bremen  
Universität Oldenburg • University of Oldenburg

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Staatlichkeit im Wandel • Transformations of the State  
Sonderforschungsbereich 597 • Collaborative Research Center 597



*Peer Zumbansen*

***Neither ‘Public’ Nor ‘Private’, ‘National’ nor ‘International’:  
Transnational Corporate Governance  
from a Legal Pluralist Perspective***

TranState Working Papers

No. 128

*Sfb597 „Staatlichkeit im Wandel“ – „Transformations of the State“*

Bremen, 2010

[ISSN 1861-1176]

**Peer Zumbansen**

Neither ‘Public’ Nor ‘Private’, ‘National’ nor ‘International’: Transnational  
Corporate Governance from a Legal Pluralist Perspective  
(TranState Working Papers, 128)

Bremen: Sfb 597 „Staatlichkeit im Wandel“, 2010

ISSN 1861-1176

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***Neither ‘Public’ Nor ‘Private’, ‘National’ nor ‘International’:  
Transnational Corporate Governance from a Legal Pluralist  
Perspective***

**ABSTRACT**

The following paper is part of a multi-year research project that investigates the emergence of a transnational corporate governance regime as a key example of the transformation of state-based regulation. This example received an extensive treatment in the context of a monographical study co-authored with Galf-Peter Calliess (University of Bremen, and Director, Collaborative Research Centre 597 ‘Transformation of the State’, Program on ‘*Legal Certainty on Global Markets*’). The monograph was published in May 2010 with Hart Publishing under the title: *Rough Consensus and Running Code: A Theory of Transnational Private Law*. The growing significance of expert committees mandated or self-empowered to draft binding norms for market participants in a wide range of fields illustrates the decentring of norm creation and rule-making in the ‘post-regulatory state’ of the early 21<sup>st</sup> century. The paper also contributes to a larger research project on transnational private regulation, carried out under the auspices of *Hague Institute for the Internationalisation of Law* [HiiL] at University College Dublin, the European University Institute and Tilburg University. It addresses the regulatory challenges arising from a fast-growing body of norms produced by non-state actors in the transnational arena. Focusing on the example of corporate governance codes through a legal pluralist lens, the paper investigates the arguments that qualify corporate governance codes as either ‘soft’ law or as non-law and rejects this categorization with reference to the wide-ranging evidence of new forms of regulatory governance both within and outside of the nation-state. The creation of corporate governance codes is seen as example of indirect regulation in politically sensible regulatory areas, where state law makers engage in forms of collaborative norm creation for example in the form of private code drafting and subsequent public endorsement. In the case of the German corporate governance code, however, the drafting of the Code occurred in a non-exclusively private sphere, which raises important questions as to the adequacy of the public-private distinction with regard to the assessment of the existence or the lack of legitimacy of contemporary norm-making processes. This paper was first presented at the Inaugural International Programme Conference of the HiiL Project at University College Dublin on 16 June 2010.

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## **Neither ‘Public’ Nor ‘Private’, ‘National’ nor ‘International’: Transnational Corporate Governance from a Legal Pluralist Perspective’**

### **A. INTRODUCTION**

Much of today’s writing on ‘global governance’ presumes a fundamental gap between the domestic forms, institutions and instruments of legal regulation on the one hand and what is perceived as a dramatic regulatory void on the global scale on the other. This anxiety is particularly accentuated with regard to border-crossing, global corporate activity, which is seen as having over time successfully escaped the reach of traditional, nation state-based forms of regulation. As the literature on the challenges of regulating the conduct of multinational business corporations [MNCs] has been growing exponentially, the contention remains, however, whether or not an answer to this alleged exhaustion of the regulatory state in the face of global corporate (mis-)conduct is likely to be found in the *extension* of the regulatory grasp of the nation state – or of international state bodies – in a kind of ‘expanded jurisdiction’ sense. By contrast, what appears to emerge from a continuing, rich assessment by lawyers<sup>2</sup>, political scientists<sup>3</sup> and economists<sup>4</sup> with the corporate, labour law and human rights dimensions of MNC is a growing awareness of the need to approach the problem from what has fruitfully been re-

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<sup>1</sup> I am grateful for comments from Fabrizio Cafaggi, Martin Böhmer, and Jacco Bomhoff and the participants of the *Transnational Private Regulation* Conference in Dublin, June 2010. Financial assistance from the Hague Institute for the Internationalisation of Law and from the *Social Sciences and Humanities Research Council of Canada* [Grant # 864-2007-0265] is gratefully acknowledged. This paper was completed during a research stay at the Collaborative Research Centre 597 ‘Transformations of the State’ at the University of Bremen and the Hanse Institute of Advanced Study, Delmenhorst, Germany, June 2010.

<sup>2</sup> Peter Muchlinski, *Multinational Enterprises and the Law*, 2nd ed. (Oxford University Press, 2007); see already Detlev F. Vagts, ‘The Multinational Enterprise: A New Challenge for Transnational Law’ (1969) 83 *Harvard Law Review* 739.

<sup>3</sup> John Ruggie, ‘Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework. Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises’ (2010) A/HRC/14/27 [http://baseswiki.org/w/images/en/0/04/2010\\_Advance\\_Edited\\_Report.pdf](http://baseswiki.org/w/images/en/0/04/2010_Advance_Edited_Report.pdf).

<sup>4</sup> John H. Dunning and Sarianna M. Lundan, *Multinational Enterprises and the Global Economy*, 2nd ed. (Edward Elgar, 2008).



ferred to as a ‘regulatory governance’ perspective.<sup>5</sup> From this vantage point the challenge presents itself no longer as one of law’s limits (or as the ‘end of the state’), but as one, which is foremost concerned with the way in which law operates, is created and enforced in the global arena. And from this perspective, then, we can begin to take into view the actually *existing* forms of corporate regulation. In other words, a theory of norm creation in the context of global market activities might not be found through a mere extension or *translation* of nation state based doctrine onto a rudimentarily defined sphere ‘beyond’ or ‘outside’ the nation state. What is needed, instead, is a theory that allows for a reflection on the manifold ways in which norms have been emerging in the space between what we refer to as the ‘domestic’ on the one hand and the ‘global’ on the other. As shall be elaborated in the following, for a legal theory of global regulation, ‘space’ is not meant to depict a geographical realm, but instead a *methodological* one in which the meanings – and, limitations – of our distinction between the ‘national’ and the ‘global’ can be addressed.

Such a reflection must incorporate a high degree of empirical evidence of existing forms of self-regulation such as codes of conduct, of recommendations, ‘social norms’<sup>6</sup> or ‘governing contracts’<sup>7</sup>, but it must do so against the background of a theoretical investigation into the concept of law, which underlies and informs the almost habitual, routine distinction between ‘law’ on the one hand and these myriad forms of ‘alternative forms of regulation’ on the other. The lawyer (as any other scientist) cannot simply ‘go out and see’, but must account for the conceptual bias with which this confrontation with ‘reality’ occurs. In this process, the study of the fast-proliferating forms of public-private, hybrid norms that apply to market activity, turns into a self-reflection on the theoretical starting points of the larger legal theory from the vantage point of which this incorporation of empirical evidence takes place.<sup>8</sup> It is, thus, not simply an option to build a theory on, say, the ‘fact’ of ubiquitous forms of market self-regulation, but

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<sup>5</sup> Colin Scott, 'Regulatory Governance and the Challenge of Constitutionalism' (2010) *EUI Working Papers Robert Schuman Centre for Advanced Studies, Private Regulation Series-02* <http://ucd>.

<sup>6</sup> Lisa Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21 *Journal of Legal Studies* 115

<sup>7</sup> See the contributions to the Symposium: ‘Governing Contracts: Public and Private Perspectives’ (2007) 14 *Indiana Journal of Global Legal Studies* 183-483.

<sup>8</sup> Stewart Macaulay, 'Relational Contracts Floating on a Sea of Custom? Thoughts about the Ideas of Ian Macneil and Lisa Bernstein' (2000) 94 *Northwestern University Law Review* 775; Gregory Shaffer and Victoria Nourse, 'Varieties of New Legal Realism: Can A New World Order Prompt A New Legal Theory?' (2009) 61 *Cornell Law Review* 61

instead a necessary reflection on how one or more existing theories of how legal norms are in fact incorporate and account for this particular empirical evidence.

The core contention of this paper is that the challenging nature of the regulation of global corporate conduct requires an adequately differentiated approach towards the identification and analysis of the norms in question. The central question, which will be addressed is: “What is the concept of law that underlies the regulation of global corporate conduct?” I will try to suggest an answer by proceeding in three steps. First, I will take issue with the frequently found contention that global corporate conduct is, in view of the alleged inability or, exhaustion of states to effectively ‘intervene’, foremost a matter of *self-regulating markets*. This part of our discussion will require a scrutiny of what lawyers seem to mean when they refer to the market. In a second step, I will argue that an exemplary area such as corporate governance can best be understood as an instance of what I call *transnational legal pluralism*, that is as a field that becomes visible through a particular methodological lens, which revisits the longstanding legal sociological analysis of norm creation in the transnational arena. In order to illustrate this approach, the following section will provide a brief introduction into the place and relevance of corporate governance codes in the present evolution of this regulatory area. A particular emphasis will here be placed on the particular nature and dynamics of overlapping forms of state and non-state, hard and soft regulation. In conclusion, the last section will suggest how the lessons of such a case study can contribute to an ongoing theoretical investigation into the nature of global regulatory governance.

## **B. MARKETS AND STATES AS REFERENCE POINTS IN THE REGULATION DEBATE**

### **I. The ‘Death of the State by Globalisation’-Thesis**

Even if we were to accept recommendations to let markets govern themselves because the nature of global capitalism allegedly meant an end for unilateral, autonomous national Keynesian economic policies<sup>9</sup>, this would still not jive with the general contention that globalisation enslaves, dis-empowers and overwhelms states – as an agent in itself. What is wrong with this picture is the juxtaposition of the state and globalisation as two quasi-actors who are involved in a struggle over regulatory authority, ending with globalization getting the upper hand. What is right, if anything about this claim, however, is that this perspective has been extremely pervasive in the context of dramatic changes in the way that states have been operating over the last decades, a transformation that has – again and again – been associated with the expansion of globalisation. At the basis

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<sup>9</sup> Thomas L. Friedman, *The Lexus and the Olive Tree* (Random House, 2000)

of such contentions of the ‘death’ or the ‘retreat’ of the state are, above, all accounts of how particular regulatory approaches, which have their origin in state-based models of legal and political regulation, are no longer adequate to govern activities that are seen to dramatically transcend the jurisdictional and authoritative scope of state competence. The welfare state’s regulatory ‘crisis’ of the 1970s in the face of an exponentially grown budget, the oil price shock and the growing awareness of the state’s limits in designing adequately sophisticated policy programmes for a highly differentiated, pluralist society<sup>10</sup> finds itself exacerbated in the nation state’s crisis in an era of globalisation.<sup>11</sup>

By contrast, at least two accounts of rich evidence of what states actually ‘do’, challenge this perception in a fundamental way. On the one hand, there are by now a great number of pertinent accounts related to the changes in administrative governance *within* the nation state that illustrate a far-reaching transformation of the state in a plethora of regulatory fields. The ongoing investigations among administrative and constitutional lawyers, political scientists, sociologists and regulatory theorists give ample evidence of how the state has long been increasingly involved in complex collaborations, delegations, trade-offs, and myriad other divisions of labour with civil society or, ‘market’ actors.<sup>12</sup> At the same time, there is a rich repository of studies related to the creation and nature of norms in the context of market self-regulation, that point not to the end of the state, but rather suggest a highly complex relationship between state and non-state actors in the production and administration of these norms.<sup>13</sup>

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<sup>10</sup> Jürgen Habermas, 'The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies [1985]' in J Habermas (ed) *The New Conservatism Cultural Criticism and the Historians' Debate* [ed and transl by Shierry Weber Nicholsen] (MIT Press, 1989)

<sup>11</sup> See the critical discussion by Fritz W. Scharpf, 'The viability of advanced welfare states in the international economy: vulnerabilities and options' (2000) 7 *Journal of European Public Policy* 190.

<sup>12</sup> See e.g. Mark Bevir and R.A.W. Rhodes, 'Searching for Civil Society: Changing Patterns of Governance in Britain' (2003) 81 *Public Administration* 41; Richard J. Stillman II, 'Twenty-First Century United States Governance: Statecraft and the Peculiar Governing Paradox it Perpetuates' (2003) 81 *Public Administration* 19; Robert Elgie, 'Governance Traditions and Narratives in Public Sector Reform in Contemporary France' (2003) 81 *Public Administration* 141; Martin Loughlin, 'The Functionalist Style in Public Law' (2005) 55 *UTLJ* 361

<sup>13</sup> Lisa Bernstein, 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms' (1996) 144 *University of Pennsylvania Law Review* 1765; Gillian Hadfield, 'The Public and the Private in the Provision of Law for Global Services' in V Gessner (ed) *Contractual Certainty in International Trade Empirical Studies and Theoretical Debates on Institutional Support for Global Economic Exchanges* (Hart Publishing, 2009); for a discussion, see e.g. Galf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart Publishing, 2010), ch. 2.

As a result, the picture of law's limits or, even, exhaustion with regard to global market begins to lose its sharp contours. What we see is not the futile struggle of nation states playing a regulatory and policy catch-up game with de-territorialised corporate and commercial actors or other amorphous crystallizations of globalization forces. Instead, an image begins to form of a rising number of actors with the capacity to expand indeed on a vast territorial and operational scale. At the same time, we witness an intricate overlapping of 'hard' and 'soft' norms, which are being produced by both state and non-state actors in the regulation of these activities. The state, far from being a victim of larger globalisation forces, is instead deeply involved in the production and administration of the norms that govern the global market place<sup>14</sup>, even if he is by far not the sole author of governing regulations.<sup>15</sup>

This constellation invites analysis from a host of perspectives, and the intriguing emphasis placed by legal scholars in the recent past on the importance of 'regulation' and 'governance' is an important and crucial element in this regard.<sup>16</sup> It is becoming increasingly clear that a legal theory of these forms of regulation 'within' and 'beyond' the nation state cannot be adequately developed *from within*, but must instead take into account how existing forms of regulation testify to an intricate overlap of different forms and concepts of regulation. The impressive rise in importance of *new institutional economics* in the idea competition over 'governance' is of eminent importance in this regard.<sup>17</sup> As a result, 'economic governance'<sup>18</sup> has developed into a sophisticated regulatory theory that must be taken seriously by anyone interested in the evolution of regulatory governance – which certainly should include lawyers.<sup>19</sup> As this short paper cannot do

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<sup>14</sup> See e.g. Saskia Sassen, 'The State and Globalization' in JS Nye and JD Donahue (eds), *Governance in a Globalizing World* (Brookings Institution, 2000).

<sup>15</sup> Rodney Bruce Hall and Thomas J. Biersteker, 'The Emergence of Private Authority in the International System' in RB Hall and TJ Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge University Press, 2002); A. Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Economy* (Cambridge University Press, 2003).

<sup>16</sup> Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post Regulatory State' in J Jordana and D Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar, 2004); Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation. Texts and Materials* (Cambridge University Press, 2007).

<sup>17</sup> See Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990), and Oliver E. Williamson, 'The New Institutional Economics: Taking Stock, Looking Ahead' (2000) 38 *Journal of Economic Literature* 595.

<sup>18</sup> Oliver E. Williamson, 'The Economics of Governance' (2005) 95 *American Economic Review* 1.

<sup>19</sup> Peer Zumbansen and Galf-Peter Calliess, 'Law, Economics and Evolutionary Theory: State of the Art and Inter-

justice to the rich and wide-ranging exchanges between lawyers and economists on the respective boundaries and overlaps between their fields already under way<sup>20</sup>, I will suggest to focus, instead, on the one concept that occupies a crucial and yet strangely undefined place in this interaction, the *market*. The general contention that there is a choice between state ‘intervention’ and ‘self-regulating markets’ regularly operates with seemingly self-explanatory concepts of each. As we have seen with regard to the ‘state’ and its presumed demise in the face of globalization, this can easily be very misleading. Against the background of an extensive critique of the alleged neutral nature of quasi-natural markets<sup>21</sup>, we shall in the following section briefly revisit Karl Polanyi’s depiction of market disembeddedness as a crucial step in the analysis of economic regulation, before looking more closely at the changing perceptions of the state in this context.

## **II. Markets And Their Global Disembeddedness**

### ***1. Society as an Adjunct to the Market***

In his famous chapters on “*Societies and Economic Systems*” and the “*Evolution of the Market Pattern*”, which we today refer to for the concept of the embeddedness of the market, the political economist Karl Polanyi writes:

*“Though the institution of the market was fairly common since the later Stone Age, its role was no more than incidental to economic life.”*<sup>22</sup>

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disciplinary Perspectives’ in P Zumbansen and G-P Calliess (eds), *Law, Economics and Evolutionary Theory* (Edward Elgar, 2010)

<sup>20</sup> For the area of international law, see the vivid disputes around the concept of customary law: Jack Goldsmith and Eric Posner, *The Limits of International Law* (Harvard University Press, 2005), Andrew T. Guzman, *How International Law Works. A Rational Choice Theory* (Oxford University Press, 2008), and Oona A. Hathaway and Ariel N. Lavinbuk, ‘Rationalism and Revisionism in International Law’ (2006) 119 *Harvard Law Review* 1404, Paul Schiff Berman, ‘Seeing Beyond the Limits of International Law: Jack L. Goldsmith/Eric A. Posner, The Limits of International Law’ (2006) 84 *Texas Law Review* 1265; for the area of corporate law, see e.g. Gillian K. Hadfield and Eric Talley, ‘On Public versus Private Provision of Corporate Law’ (2006) 22 *Journal of Law, Economics & Organization* 414, and Peer Zumbansen, ‘Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law’ (2008) 56 *American Journal of Comparative Law* 769.

<sup>21</sup> Robert L. Hale, ‘Coercion and Distribution in a Supposedly Non-Coercive State’ (1923) 38 *Political Science Quarterly* 470; Morris R. Cohen, ‘Property and Sovereignty’ (1927) 13 *Cornell Law Quarterly* 8; Kerry Rittich, ‘Functionalism and Formalism: Their latest Incarnations in Contemporary Development and Governance Debates’ (2005) 55 *University of Toronto Law Journal* 853.

<sup>22</sup> Karl Karl Polanyi, *The Great Transformation. The Political and Economic Origins of our Time* (Beacon Press, 1944)), p. 43; this passage is later complemented – in the same chapter – by his remarks about “man as a social

A little later, he remarks that:

*“The outstanding discovery of recent historical and anthropological research is that man’s economy, as a rule, is submerged in his social relationships. [...] Neither the process of production nor that of distribution is linked to specific economic interests attached to the possession of goods; but every single step in that process is geared to a number of social interests which eventually will be very different in a small hunting or fishing community than those in a vast despotic society, but in either case the economic system will be run on non-economic motives.”<sup>23</sup>*

As is well known, this chapter (4) concludes in the elaboration of the three famous market-structuring and market-organising principles: “reciprocity” (related to family and kinship), “re-distribution” (the central collection and dissemination of production – “... these functions of an economic system proper are completely absorbed by the intensively vivid experiences which offer superabundant non-economic motivation for every act performed in the frame of the social system as a whole.” (p. 48)), and “householding” (*oekonomia*), which precedes the rising levels of division of labour, as well as the role of money and credit. Building on this taxonomy in Chapter 5, entitled “Evolution of the Market Pattern”, Polanyi famously notes that:

*“the control of the economic system by the market is of overwhelming consequence to the whole organization of society: it means no less than the running of society as an adjunct to the market. Instead of economy being embedded in social relations, social relations are embedded in the economic system.”<sup>24</sup>*

It is here, where, as under a magnifying glass, we not only find the kernel of the critique of capitalism unfolding in the latter half of the Twentieth century, which has returned onto our agenda with the greatest urgency today,<sup>25</sup> but also a powerful illustration of the differentiation concept of contemporary modern sociology, most strikingly, the thesis of the hegemony of the economic system in a functionally-differentiated society.<sup>26</sup> Polanyi writes:

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being” (*ibid.*, p. 46): “His natural endowments reappear with a remarkable constancy in societies of all times and places; and the necessary preconditions of the survival of human society appear to be immutably the same.”

<sup>23</sup> Polanyi, note 1 *supra*, p. 46.

<sup>24</sup> Polanyi, note 1 *supra*, p. 57.

<sup>25</sup> See, for example, J.Jacques Derrida, *Specters of Marx. The State of the Debt, the Work of Mourning and the New International* (Routledge, 1994)); R. Richard Rorty, *Das kommunistische Manifest 150 Jahre danach* (Suhrkamp, 1998)).

<sup>26</sup> N. Niklas Luhmann, *Die Wirtschaft der Gesellschaft* (Suhrkamp, 1988)).

*“The vital importance of the economic factor to the existence of society precludes any other result. For once the economic system is organized in separate institutions, based on specific motives and conferring a special status, society must be shaped in such a manner as to allow that system to function according to its own laws. This is the meaning of the familiar assertion that a market economy can function only in market society.”<sup>27</sup>*

A little further on, follows a devastatingly prophetic observation of competitive markets:

*“With every step that the state took to rid the market of particularist restrictions, of tolls and prohibitions, it imperiled the organized system of production and distribution which was now threatened by unregulated competition and the intrusion of the interloper who ‘scooped’ the market but offered no guarantee of permanency.”<sup>28</sup>*

## **2. The Exaggerated News of the Death of the State**

At the beginning of the Twenty-first century and in midst of a dramatic financial and economic crisis, can it be important – and even beneficial - to rely on Polanyi to help us think through the challenges of end-of-history market regulation? Can his observations offer analytical tools for an adequate explanation of contemporary markets? In this paper, I suggest that while Polanyi’s analysis of market disembeddedness remains a central pillar in our continuing assessment of the meaning of market regulation, we are well advised to complement his analysis by a further inquiry into the transformation of regulatory actors and instruments that are pertinent in this field. Such an inquiry, however, must go beyond a mere contemplation as to which degree lawyers ought to take insights from sociologists and political scientists into account when they are designing supposedly more ‘effective’ or ‘better’ forms of regulation, as pursued – for example – by the European Commission.<sup>29</sup> I suggest that such an inquiry must be above all a methodological one, meaning that it must take seriously the competition among different regulatory approaches, above all law and economics – not ‘*law & economics*’.

My argument has two parts and in the first focuses on – and rejects – the much alleged ‘loss of state sovereignty and regulatory exhaustion’ perception that underlies many of the crisis policy arguments today. The second step of the argument is concerned with the competition between law and alternative approaches to regulation, most prominently captured today, on the part of lawyers, by references to ‘soft’ law, codes of conduct,

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<sup>27</sup> *Ibid.*

<sup>28</sup> Polanyi, *supra*, p. 66.

<sup>29</sup> [http://ec.europa.eu/governance/better\\_regulation/index\\_en.htm](http://ec.europa.eu/governance/better_regulation/index_en.htm)

‘governance through disclosure’ or ‘social norms’ and, on the part of in particular New Institutional Economics, by the distinction between ‘informal’ and ‘formal’ modes of regulation.

As concerns the first step of my argument: it starts from a perceived loss in confidence among lawyers with regard to their ability to provide for adequate regulatory tools. It posits in particular that a legal theoretical analysis of the changing forms of regulation in this area can carve out promising perspectives on the distinct role of law and legal regulation in what has become a highly diversified and multi-layered regulatory landscape, where in fact law is no longer supreme. Such a perspective, I suggest, could be a promising response to the perception prevailing today that the only way to address the tremendous economic, financial and social fall-out of the current crisis would be a ‘return of the state’. The Achilles heel of this approach is its misrepresentation of the role played by the state and its sweeping attempts over the last thirty years to enhance the global competitiveness of national firms through the facilitation of a wide-ranging network of self-regulating norm clusters in corporate and commercial law as well as in securities regulation. As has been aptly analysed, the past three decades, usually counted from the enthronement of Thatcher and Reagan<sup>30</sup>, have seen less a retreat, demise or death of the state, than a fundamental transformation in the way that the state has been involved in the global proliferation of market regulation.<sup>31</sup> Images of ‘more’ state now in contrast to an alleged ‘less’ or, weaker or retreated state yesterday are misleadingly suggesting a choice of quantity, rather than *quality*. As becomes strikingly obvious in the analysis of the evolving forms of regulation in the named fields, the role of the state, far from diminishing, has instead changed from the primary or exclusive author of binding norms (and, of course, this depiction is itself untenable and overstated<sup>32</sup>) to being one among other highly influential actors involved in the collaborative, experimental,

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<sup>30</sup> Ronald Dore, William Lazonick and Mary O'Sullivan, 'Varieties of Capitalism in the Twentieth Century' (1999) 15 *Oxford Review of Economic Policy* (*Oxford Rev Econ Pol'y*) 102; Ronald Dore, 'Financialization of the Global Economy' (2008) 17 *Industrial and Corporate Change* 1097.

<sup>31</sup> David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598 *The Annals of The American Academy of Political and Social Science* 12; Julia Black and David Rouch, 'The development of global markets as rule-makers: engagement and legitimacy' (2008) *Law and Financial Markets Review* 218; Galf-Peter Calliess, 'Transnational Civil Regimes: Economic Globalization and the Evolution of Commercial Law' in V Gessner (ed) *Contractual Certainty in International Trade Empirical Studies and Theoretical Debates on Institutional Support for Global Economic Exchanges* (Hart Publishing, 2009)

<sup>32</sup> Harry W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England* (University of Toronto Press, 1988)



direct and indirect production of norms relevant to particular areas of market activity.<sup>33</sup> It is against this background, that our analysis has to strive for a better understanding of the changing form of the state<sup>34</sup> while at the same time challenge the frequently found perception that the state is in fact the only legitimate and competent law-making authority. Such a shift in perspective is mandatory in order to take into the view the myriad forms that the state has for the longest time been involved in a permanent transformation of sovereignty in various directions. The state's entanglement in the far-reaching regulation of markets, the provision of subsidies (including large-scale 'bail-outs' as in present times) and institutional guarantees in areas such as health, education, security or infrastructure are only some of the domestic illustrations of this fact<sup>35</sup>, while the state's engagement with other states, governments, supra-national organisations, INGOs and global civil society actors illustrates another, more 'outward'-oriented relativisation of state sovereignty.<sup>36</sup>

The following observations are limited to what can at best be a cursory study of the institutional and conceptual dimensions of a particular form of market regulation illustrated by the example of corporate governance codes. Such an investigation offers a host of insights into the particular way in which market regulation has been evolving in a framework that cannot be adequately depicted as either national or international, public or private. Instead, the particular relation between state and non-state actors in the initiation and execution of the norm-creation process and the ensuing implementation, dissemination and administration of the norms in question defy categorisations through which we would like to neatly assign the authority for such a particular regulatory regime to one side or the other. The chosen field, corporate governance, is a case in point in the study of transnational law making, as I will try to argue by scrutinizing both the underlying meaning of transnational and the concept of law informing this approach. I

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<sup>33</sup> See for an insightful discussion: Colin Scott, 'Regulating Everything' (2008) *Inaugural Lecture, University College Dublin, School of Law, 2622008* <http://geary.ucd.ie/mapping/images/Documents/RegEverything.pdf>.

<sup>34</sup> See hereto also Stephen Bell and Andrew Hindmoor, *Rethinking Governance. The Centrality of the State in Modern Society* (Cambridge University Press, 2009)

<sup>35</sup> Michael Stolleis, 'Die Entstehung des Interventionsstaates und das öffentliche Recht' (1989) 11 ZNR 129; but see as well the rich analysis in the context of the 'Varieties of Capitalism'-School: Peter A. Hall and David Soskice (eds), *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001); Wolfgang Streeck and Kozo Yamamura (eds), *The Origins of Nonliberal Capitalism in Germany and Japan* (Cornell Studies in Political Economy, Cornell University Press, 2001).

<sup>36</sup> Mary Kaldor, 'The Idea of Global Civil Society' (2003) 79 *International Affairs* 583; Saskia Sassen, 'The State and Globalization' in JS Nye and JD Donahue (eds), *Governance in a Globalizing World* (Brookings Institution, 2000)

will argue, that areas such as corporate governance regulation must today be understood as instances of “global assemblages”,<sup>37</sup> or, from a legal theoretical viewpoint, as examples of *transnational legal pluralism*.<sup>38</sup> As such, a regulatory field such as corporate governance is, on the one hand, neither exclusively national (domestic) nor international, while, on the other, this does not imply the elimination or the overcoming of the nation state.<sup>39</sup> In addition, such an area does not jive with the public/private distinction as applied to the nature of the norm-creating actor that is so central to our learned ways of assigning law-making authority.<sup>40</sup> Instead, these assemblages, in their description through Saskia Sassen, are constituted through persistent local activity and interpretation, and are - as such - comprised of human, institutional and technological elements, the latter resulting pre-dominantly from the breathtaking advances in information technology (“digitalisations”).<sup>41</sup> In contrasting the concept of transnational legal pluralism with that of Sassen’s global assemblages, I will suggest that, despite the convincing account of the changed and yet crucial relationship between the national and the global spheres, which Sassen presents, there is a continuing need for a specifically *legal* perspective on the re-configuration of “spaces and places” which is so powerfully shaping human activity and policies. It is this emphasis on the legal theoretical re-construction of both Polanyi’s theme of embeddedness and of Sassen’s metaphor of assemblages that holds considerable promise for rendering a timely concept of transnational markets. In order to carve out such a distinctly legal theoretical perspective, it is necessary to place the existing assessments of the relationship between the state and the market into a larger discursive context, namely that of global governance, for it is here that we can find

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<sup>37</sup> For this concept, see S. Sassen, *Territory - Authority - Rights. From Medieval to Global Assemblages*, (Princeton NJ-Oxford: Princeton University Press, 2006); for earlier elaborations, see *idem*, *The Global City*, (Princeton NJ: Princeton University Press, 1991), and *idem*, *Globalization and Its Discontents. Essays on the New Mobility of People and Money*, (New York: The New Press, 1998); see, also, M. Amstutz & V. Karavas, “Weltrecht: Ein Derridasches Monster”, in: G.-P. Calliess, A. Fischer-Lescano, D. Wielsch & P. Zumbansen, (eds), *Soziologische Jurisprudenz. Liber Amicorum für Gunther Teubner zum 65. Geburtstag*, (Berlin-New York: Walter de Gruyter, 2009), pp. 647-674.

<sup>38</sup> P. Zumbansen, “‘New Governance’ in European Corporate Governance Regulation as Transnational Legal Pluralism”, (2008) 15 *European Law Journal*, pp. 246-276, available at: <http://ssrn.com/abstract=1128145>; P. Zumbansen, Transnational Legal Pluralism, *forthcoming* in (2010) 1:2 *Transnational Legal Theory*, available as CLPE Research Paper 01/2010, at: <http://ssrn.com/abstract=1542907>

<sup>39</sup> Sassen, 2006, note 8 *supra*, p. 325.

<sup>40</sup> Carol Harlow, “‘Public’ and ‘Private’ Law: Definition without Distinction” (1980) 43 *Modern Law Review* 241

<sup>41</sup> Sassen, 2006, note 8 *supra*, p. 349 (noting the importance of focusing on financial centres, not “markets”, “as key nested communities enabling the construction and functioning of such cultures of interpretation”).

important stimuli for a renewed reflection on the emerging role of law in a concert of competing regulatory theories.

## **C. TRANSNATIONAL LEGAL PLURALISM**

### **I. The Ambivalence of Global Governance**

The wide-ranging discourses around ‘global governance’ offer an important opportunity to gain new and further insights into the building blocks of an emerging legal, political and economic order. The struggle with the absence of ‘world government’ is undeniably a struggle - over the form and legitimacy of – any – government itself. As such, current inquiries into the role of the state and the nature of legal regulation are charged with the translation of an extremely rich repository of rights critique, ‘law and society’ scholarship, ‘law and economics’ analysis, and legal anthropology into the discourses unfolding under the umbrella of an interdisciplinary study of transnational regulatory regimes. Such a research agenda develops against the background of the ‘anti-positivist’ origins of legal pluralism<sup>42</sup>, which eventually evolved into a highly differentiated and empirically driven analysis of co-existing and overlapping regulatory regimes.<sup>43</sup> The emergence of ‘governance studies’<sup>44</sup> and the increasingly influential study of law through a regulatory lens<sup>45</sup> testify to an important widening and deepening of the legal analytical apparatus. Seen in this light, the present obsession with the alleged novelty of a ‘global’ legal and political order has direct ties to preceding contestations of welfare state governments and their aftermaths in the last two decades, including a significant function-

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<sup>42</sup> Richard Ashby Wilson, 'Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law' in M Goodale and SE Merry (eds), *The Practice of Human Rights: Tracking Law Between the Global and the Local* (Cambridge University Press, 2006), 345.

<sup>43</sup> Sally Engle Merry, 'Anthropology, Law, and Transnational Processes' (1992) 21 *Annual Review of Anthropology* 357; Sally Engle Merry, 'New Legal Realism and the Ethnography of Transnational Law' (2006) 31 *Law & Social Inquiry* 975; Gregory Shaffer and Victoria Nourse, 'Varieties of New Legal Realism: Can A New World Order Prompt A New Legal Theory?' (2009) 61 *Cornell Law Review* 61.

<sup>44</sup> See e.g., Scott Burris, Michael Kempa and Clifford Shearing, 'Changes in Governance: A Cross-Disciplinary Review of Current Scholarship' (2008) 41 *Akron Law Review* 1.

<sup>45</sup> Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post Regulatory State' in J Jordana and D Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar, 2004); Colin Scott, 'Regulatory Governance and the Challenge of Constitutionalism' (2010) *EUI Working Papers Robert Schuman Centre for Advanced Studies, Private Regulation Series-02* <http://ucd>; see also Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation. Texts and Materials* (Cambridge University Press, 2007).

alisation of regulatory policies and legal principles.<sup>46</sup> Accordingly, much needed inquiries into previous experiences with rights regimes are fuelled by grave concerns over democratic representation<sup>47</sup> but remain torn between references to state-to-state relations and a concern with global ‘citizens’<sup>48</sup>, as well as over the politics of (domestic) hard and (global) soft laws<sup>49</sup> and the nature of rights<sup>50</sup> on a global scale.<sup>51</sup> Finally, the competing assertions of market regulation, before and since the unfolding of the current global financial and economic crisis<sup>52</sup>, call for a renewed assessment of the *legal* nature of mar-

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<sup>46</sup> Orly Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 *Minnesota Law Review* 342; Peer Zumbansen, 'Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law' (2008) 56 *American Journal of Comparative Law* 769.

<sup>47</sup> David Held, 'Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective' (2004) 39 *Government and Opposition* 364; David Held, 'Reframing Global Governance: Apocalypse Soon or Reform!' in D Held and A McGrew (eds), *Globalization Theory Approaches and Controversies* (Polity, 2007); Regina Kreide, 'The Ambivalence of Juridification. On Legitimate Governance in the International Context' (2009) 2 *Global Justice: Theory Practice Rhetoric* 18.

<sup>48</sup> For an insightful discussion, see Rainer Forst, 'Towards a Critical Theory of Transnational Justice' in T Pogge (ed) *Global Justice* (Blackwell Publishing, 2001).

<sup>49</sup> Walter Mattli and Ngaire Woods, 'In Whose Benefit? Explaining Regulatory Change in Global Politics' in W Mattli and N Woods (eds), *The Politics of Global Regulation* (Cambridge University Press, 2009).

<sup>50</sup> See, for example, Duncan Kennedy, 'The Critique of Rights in Critical Legal Studies' in W Brown and J Halley (eds), *Left Legalism/Left Critique* (Duke University Press, 2002); see also Conor Gearty, *Can Human Rights Survive? (2005 Hamlyn Lectures)* (Cambridge University Press, 2006), in particular ch. 3. Still a very insightful critique is provided by Crawford Brough Macpherson, 'The Rise and Fall of Economic Justice' (1987) in: *Macpherson, The Rise and Fall of Economic Justice, and other Essays The role of state, class and property in twentieth-century democracy* 1, in particular ch. 2: 'Problems of Human Rights in the Late Twentieth Century'.

<sup>51</sup> Sundhya Pahuja, 'Rights as Regulation: The Integration of Development and Human Rights' in B Morgan (ed) *The Intersection of Rights and Regulation* (Ashgate, 2008); Fleur E. Johns, 'Global Governance: An Heretical History Play' (2004) 4 *Global Jurist Advances* Art. 3 (<http://ssrn.com/abstract=603232>), 11, 29, 37: 'The space of global governance, as described in these writings [referencing work by John Coffee Jr., Richard Falk, Anne-Marie Slaughter and others, PZ], is a realm aspiring to be one of coherence and predestination. It is a space in which earthly divisions are to melt away before the final judgment of the market or the universal decrees of human rights. In this domain, the actions of governments, corporations, laborers, employers, even refugees are fused into pre-inscribed patterns of convergence.' See also Joseph Raz, 'Human Rights in the Emerging World Order' (2010) 1 *Transnational Legal Theory* 31.

<sup>52</sup> See e.g., Joseph E. Stiglitz, *Freefall. America, Free Markets and the Sinking of the World Economy* (W.W. Norton & Co., 2010), and Christian Marazzi, *The Violence of Financial Capitalism* (Edizioni Casagrande, 2010).

kets, long ago scrutinized by Legal Realist scholars<sup>53</sup> as well as of the particular forms of legal and non-legal regulation that remain at the centre of ‘law and society’<sup>54</sup> scholarship and studies of ‘legal pluralism’.<sup>55</sup> It is being increasingly recognized that such inquiry cannot remain confined to a discipline or field on its own: branches of economics as well as a wide range of ‘social sciences’ have been called upon to contribute to the emergence of a more layered and more differentiated concept of ‘regulatory governance’<sup>56</sup>, of which the field of corporate governance is a most telling illustration.

## **II. The Emergence of Transnational Regulatory Landscapes**

Corporate governance has to be seen in the context of a highly diversified series of transnational norm-setting processes resulting in a veritable explosion of corporate governance codes in Europe and elsewhere. With the proliferation of corporate governance codes, influenced and pushed by international<sup>57</sup> and transnational activities of norm setting, discussion and thought exchange<sup>58</sup>, it has become increasingly difficult to identify a single institution or author of a set of norms. Instead, much of the production and dissemination of corporate governance rules operates through the migration of standards<sup>59</sup> and a cross-fertilisation of norms. A distinct feature of this de-territorialised production

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<sup>53</sup> Hale and Cohen, *supra*, note 20.

<sup>54</sup> Lawrence M. Friedman, 'Coming of Age: Law and Society Enters an Exclusive Club' (2005) *Annual Review of Law and Social Sciences* 1.

<sup>55</sup> Sally Engle Merry, 'Legal Pluralism' (1988) 22 *Law & Society Review* 869; Harry W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England* (University of Toronto Press, 1988); Derek McKee, 'Review Essay - Context and Commitment: A Pluralist Perspective on the Paradox of Law (On Melissaris' *Ubiquitous Law*)' (2010) 11 *German Law Journal* 573-584.

<sup>56</sup> Oliver E. Williamson, *The Economics of Governance*, Nobel Prize Lecture 2009, available at: [http://nobelprize.org/nobel\\_prizes/economics/laureates/2009/williamson-lecture.html](http://nobelprize.org/nobel_prizes/economics/laureates/2009/williamson-lecture.html); see also Oliver E. Williamson, 'The Economics of Governance' (2005) 95 *American Economic Review* 1; Colin Scott, 'Regulatory Governance and the Challenge of Constitutionalism' (2010) *EUI Working Papers Robert Schuman Centre for Advanced Studies, Private Regulation Series-02* <http://ucd>; Peer Zumbansen and Galf-Peter Calliess, 'Law, Economics and Evolutionary Theory: State of the Art and Interdisciplinary Perspectives' in P Zumbansen and G-P Calliess (eds), *Law, Economics and Evolutionary Theory* (Edward Elgar, 2010).

<sup>57</sup> OECD; WCFCG; IVCGN

<sup>58</sup> ECGI, INSEAD, Euroshareholders etc.

<sup>59</sup> See for a comparable analysis of migrating human rights standards, Craig Scott and Robert Wai, 'Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential of Transnational "Private" Litigation' in C Joerges, I-J Sand and G Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing, 2004).

of norms is the radical challenge these processes pose for our understanding of what we call *law proper*. The dissemination of corporate governance codes, disclosure standards and rules, best practices and codes of conduct, affects the entire juridical ‘nexus of corporate governance’ as comprised of norms pertaining to company law, labour law and securities regulation<sup>60</sup>, as the decentralisation of norm producers is repeated, mirrored and reflected in the hybridisation of the norms themselves. It is in this sense, that the study of the proliferation of corporate governance codes and company law production in general and of the rules of remuneration disclosure in particular feeds into a broader research inquiry into the changing face of legal regulation in globally integrated marketplaces.

Against this background, corporate governance emerges today as a product of the fundamental transformations of regulatory instruments and institutions. As corporate law is being shaped by a complex mixture of public, private, state- and non-state-based norms, principles and rules, generated, disseminated and monitored by a diverse set of actors, a closer look at this field can serve two purposes, both of which this paper briefly addresses: one is the way in which the analysis of contemporary corporate governance regulation can help us to assess the emerging, new framework within which corporate governance, but also other rules of market regulation are evolving. Secondly, through the way in which we begin to understand this emerging transnational regulatory framework as an illustration of contemporary rule-making, the long-standing legal pluralist contention of formal and informal legal orders comes to be seen in a new light. In light of, on the one hand, early legal-sociological work by Ehrlich (“living law”) and Gurvitch (“social law”), this leads us to re-visit the core question of any sociology of law, namely, how “to investigate the correlations between law and other spheres of culture”.<sup>61</sup> Expanding the spectrum, on the other hand, with a view to the legal pluralist work of scholars such as Moore (“semi-autonomous field”), Galanter, Macaulay, Sousa Santos or Teubner, contemporary assessments of “hybrid legal spaces” (Schiff Berman) - not sufficiently captured with references to local or national contexts - might help us better understand the distinctly *transnational* emergence of regulatory regimes. The transnational lens allows us to study such regimes not as being entirely detached from

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<sup>60</sup> See John W. Cioffi, *Public Law and Private Power: Corporate Governance Reform in the United States and Germany in an Age of Finance Capitalism* (forthcoming) (Cornell University Press, 2010).

<sup>61</sup> E. Ehrlich, *Fundamental Principles of the Sociology of Law*, (orig. published in German as *Grundlegung der Soziologie des Rechts*, 1913) (New York: Russell & Russell, 1962), pp. 486-506, “The Study of the living law”; G. Gurvitch, *Sociology of Law*, (orig. published in French as *Problèmes de la sociologie du droit*) (London: Routledge and Kegan Paul, 1947); M. Rheinstein, “Review: Two Recent Books on Sociology of Law [reviewing Timasheff’s ‘Introduction’ and Gurvitch’s ‘Elements’]” (1941) 51 *Ethics*, pp. 220-231, at 221-2.

national political and legal orders, but as emerging out of them, and reaching beyond them. The transnational dimension of the new actors and the newly emerging forms of norms radicalises their semi-autonomous nature, represented in the tension between a ‘formal’ law and policy making apparatus on the one hand and the spontaneously evolving ‘informal’ norms in particular social contexts on the other<sup>62</sup>, in the following way: regulatory spaces are marked by a dynamic and often problematically-instrumentalised tension between formal and informal norm-making processes. The way in which evolving governance regimes can fast adapt to the challenges that arise from national political economies, leads to an exacerbation of the above-described tension without our being able to yet adequately depict or theorize these dynamics. The regulatory ‘failure’ of traditional, state-based legal-political intervention into multinational corporations today<sup>63</sup> has long served as an illustration of the need to develop either distinctly “post-national”, institutionalised governance forms, or self-regulatory, soft instruments of voluntary binding. While, to the public’s disbelief and to lawyers’ own professional frustration, the proposed approaches, ranging from “global jurisdiction”, “torture as tort”, transnational civil human rights litigation, and scandalisation movements including global shaming, to soft law instruments, self-binding norms, codes of conduct and best practices, have so far not been able to solve this riddle, they have at the same time underscored the need to fundamentally adapt the analytics of both norm-generation and enforcement.<sup>64</sup>

This prompts a scrutiny of the position of corporate law within a larger, highly differentiated and dynamic regulatory environment. Corporate law unfolds in a web of norms, official and unofficial, public and private, from which it receives impulses and to which it sends others, and this web is transnational in both origin and reach.<sup>65</sup> From a traditional perspective, it is marked by a combination, a complementarity and complex intersection of domestic and international regulations. By contrast, however, *transna-*

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<sup>62</sup> Sally Falk Moore, 'Law and Social Change: the semi-autonomous field as an appropriate subject of study' (1973) 7 *Law & Society Review* 719.

<sup>63</sup> For an insightful critique of such a perception, however, see Fleur Johns, 'Performing Power: The Deal, Corporate Rule, and the Constitution of Global Legal Order' (2007) 34 *Journal of Law and Society* 116.

<sup>64</sup> See the analysis by Craig M. Scott, 'Transnational Law' as Proto-Concept: Three Conceptions' (2009) 10 *German Law Journal* 859. In addition, “governance” studies become more and more important in their cross-disciplinary inquiry into changing forms of political and legal regulation: see, for example, the research program of the University of Bremen’s Collaborative Research Centre “Transformations of the State”, available at: <http://www.sfb597.uni-bremen.de/>.

<sup>65</sup> [http://www.ecgi.org/codes/all\\_codes.php](http://www.ecgi.org/codes/all_codes.php); <http://www.transnationalcorporategovernance.net>.

*tional law* (TL), as coined by Philip Jessup in 1956,<sup>66</sup> is marked by its unruly structure of public, private, domestic and international norms, produced by official and unofficial norm-entrepreneurs, which opens an altogether distinct perspective on the distinction between ‘national’ and ‘international’. Emphasizing the need to theorize the foundations of this distinction, connected Jessup’s project to legal sociological work on the co-existence of a plurality of legal orders. However well the underlying promise of such a shift in perspective was appreciated at the time, Jessup’s proposal did contain an important message for the majority of mainstream lawyers, for whom legal pluralism had always been something exotic and of interest only for those in law with a particular interdisciplinary interest in legal sociology, anthropology or regulatory theory. Jessup aimed to take a possible concept of transnational law seriously by suggesting to study the intriguing parallels between different conflicts of interest that arise both domestically and internationally. Of paradigmatic importance here was his example of shareholder democracy at home and democratic participation (and legitimacy) in international economic organisations. By highlighting the inherent parallels between the two regulatory fields, which in application of the national/international distinction had been studied in isolation from each other, Jessup was able to point to a need to adequately address the parallels as a regulatory constellation unfolding in one, not two realms of legal imagination. To the degree that lawyers increasingly knew more about the regulatory challenges that law-makers and judges were facing in different jurisdictions and in which these observers and comparative lawyers also began to see that transactions with border-crossing substance or consequences required a legal response which was adequate to the nature of this transaction, which was neither domestic nor international, transnational law came more and more into focus.<sup>67</sup>

To build upon, but also to move beyond, Jessup, in order to realise transnational law’s potential as a tool for the study of the transnational governance regime of corporate governance, we need to remember that TL can first be understood as *a field of law-making*. From this perspective, TL can capture the dramatic proliferation of law-making actors and locations (institutional dimension), and the changing nature of legal norms, as corporate behaviour is now being shaped by both public and private, official and unofficial, mandated and self-enacted norms (normative dimension). From this perspective, the proliferation of corporate law-making actors and institutions, and the resulting

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<sup>66</sup> P.C. Jessup, *Transnational Law*, (New Haven CT: Yale University Press, 1956).

<sup>67</sup> Paul Schiff Berman, 'From International Law to Law and Globalization' (2005) 43 *Columbia Journal of Transnational Law* 485; Paul Schiff Berman, 'Global Legal Pluralism' (2007) 80 *Southern California Law Review* 1155; Ralf Michaels, 'Global Legal Pluralism' (2009) *Duke Public Law & Legal Theory Research Paper No 259* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1430395](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1430395).



hybrid norms, can serve as an illustration for other fields with high political currency, given the interests involved in its development. Secondly, and more importantly, however, is the idea of transnational law as *method*.<sup>68</sup> The focus of the methodology adopted here is inspired by Jessup's suggestion that we should think of a law that is neither public nor private international law, but one that captures the mixed – institutional and normative – nature of the regulatory regimes.

As will be shown in more detail in the following section, corporate governance codes provide a telling example of this transformation of traditional state-originating, official norm-setting in favour of increasingly de-centralised, spatialised processes of norm production.<sup>69</sup> The very nature of these codes themselves has been changing dramatically as a result of this new form of transnational embeddedness. Central to the observation in this particular area that this paper focuses on is the particular nature of the regulation of business conduct and corporations in globally interdependent activity spheres (marketisation), fundamentally changing national political economies (privatisation), and a dramatic expansion of issue-driven, functionalist regulatory regimes (scientisation).<sup>70</sup> This constellation, however, suggests nothing less than a fundamental contestation and erosion of boundaries between state and non-state actors, official and unofficial law, public and private ordering.<sup>71</sup> Politics matter still, but they are no longer so easily defined as the politics of “The Right” or “The Left”, which we learned to distinguish domestically throughout the Twentieth century and right up to the recent shock to the financialised global economy. The questions that are raised not only by the commercial, productive,

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<sup>68</sup> See, already, E. ; Gaillard, “Transnational Law: A Legal System or a Method of Decision Making?”, in: K.P. Berger (ed), *The Practice of Transnational Law*, (The Hague: Kluwer Law International, 2001), pp. 53-65.

<sup>69</sup> See, in detail, G.-P. Calliess & P. Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law*, (Oxford-Portland OR: Hart Publishing, 2010), pp. 242-345.

<sup>70</sup> For an excellent demarcation of these dimensions, see Gili S. Drori and John W. Meyer, 'Scientization: Making a World safe for organizing' in M-L Djelic and K Sahlin-Andersson (eds), *Transnational Governance Institutional Dynamics of Regulation* (Cambridge University Press, 2006).

<sup>71</sup> See, for example, Volkmar Gessner, Richard P. Appelbaum and William F. Felstiner, 'Introduction: The Legal Culture of Global Business Transactions' in V Gessner, RP Appelbaum and WF Felstiner (eds), *Rules and Networks: The Legal Culture of Global Business Transactions* (Hart Publishing, 2001); Volkmar Gessner, 'Theories of Change – The Governance of Business Transactions in Globalising Economies' in V Gessner (ed) *Contractual Certainty in International Trade Empirical Studies and Theoretical Debates on Institutional Support for Global Economic Exchanges* (Hart Publishing, 2009); Francis Snyder, 'Economic Globalisation and the Law in the 21st Century' in A Sarat (ed) *The Blackwell Companion to Law and Society* (Blackwell, 2004); Katharina Pistor, 'Of Legal Transplants, Legal Irritants, and Economic Development' in P Cornelius and B Kogut (eds), *Corporate Governance and Capital Flows in a Global Economy* (Oxford University Press, 2003).

but also the re-distributive, sustainable, R&D related and routine/innovation-related activities of corporations do not lend themselves to straight-forward categorisations of *either* public *or* private, or of domestic *or* international. In response to this situation, transnational law as method suggests an assessment of the emerging regulatory framework while keeping the political questions and issues that continue to arise around particular regulatory challenges or experiences in view. The importance of transnational law as method stems from the observation that we must re-think law and regulation without resorting to traditional distinctions in the belief that they will deliver the same explanatory potential that we have grown accustomed to: instead, we must approach the emerging institutional framework from a transnational regulatory perspective. And it is here that comparative corporate law transforms itself into the study of these increasingly de-territorialised corporate governance regimes as an illustration of transnational legal pluralism.

#### **D. CORPORATE GOVERNANCE CODES**

The development of corporate governance codes can be seen as an example of intricate, domestic and transnational, multi-level processes of norm generation and norm enforcement. Starting from mere factual evidence, the emergence of corporate governance codes in recent years has begun to fundamentally alter the legal landscape of corporate law.<sup>72</sup> Despite their recognition as an essential element of corporate law<sup>73</sup>, these codes constitute a particular challenge to other, statutory approaches to law making, as they regularly are drafted by non-state actors such as non-governmental associations, private industry institutes or corporate actors.<sup>74</sup> In general, corporate governance codes are relatively short collections of, on the one hand, legal regulations that are already in force in a particular jurisdiction, and recommendations and suggestions, directed either to private corporations or, in some cases<sup>75</sup>, the law maker, concerning a company's organisa-

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<sup>72</sup> For an overview of so far existing corporate governance codes in various countries, see [http://www.ecgi.org/codes/all\\_codes.php](http://www.ecgi.org/codes/all_codes.php) (25 September 2009).

<sup>73</sup> See only Melvin Eisenberg, 'The Architecture of American Corporate Law: Facilitation and Regulation' (2005) 2 *Berkeley Business Law Journal* 167, 176, 182.

<sup>74</sup> See, for one of the first examples, the German Corporate Governance Code, the interview with Professor Theodor Baums, who chaired the commission that preceded the commission to draft the first German Corporate Governance Code: Theodor Baums, 'Interview: Reforming German Corporate Governance: Inside a Law Making Process of a Very New Nature' (2001) 2 *German Law Journal* at: [http://www.germanlawjournal.com/past\\_issues.php?id=43](http://www.germanlawjournal.com/past_issues.php?id=43).

<sup>75</sup> See Ulrich Noack and Dirk Zetzsche, 'Corporate Governance in Germany: The Second Decade, Center for Business & Corporate Law (CBC) Research Paper Series' (2005) *CBC WP No 0010* [<http://ssrn.com/>]

tion, its governance rules and disclosure regime not included in statutory law, on the other.<sup>76</sup> In the case of the German Corporate Governance Code, for example, *recommendations* are marked by the word “shall”. While Companies are free to deviate from them, they are under an obligation to disclose this deviation.<sup>77</sup> By contrast, *suggestions* can be deviated from without disclosure.<sup>78</sup> We shall see below how the German legislator has chosen to transpose this disclosure obligation into statutory law. These hybrid norms of corporate regulation<sup>79</sup>, which are neither exclusively public nor private, pose a formidable challenge to traditional thinking about law making authority, non-legal rules and their enforcement. The following section will explore the different dimensions of corporate governance codes by providing first a general introduction to the regulatory issues dealt with under the heading of *corporate governance* before studying the emergence, legal nature and the enforcement of such codes in greater detail.

## **I. What is Corporate Governance?**

The law of corporate governance is one of the fastest developing areas in law making in recent years, and discussions about ‘good corporate governance’ have for years now been surpassing the confines of academia, occupying media and public debates. In other words, “Good corporate governance is a top priority in business worldwide.”<sup>80</sup> Along-

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abstract=646761], 6-7.

<sup>76</sup> Christine Mallin, *Corporate Governance* (Oxford University Press, 2005), 19-40; Jennifer Hill, 'Regulatory Responses to Global Corporate Scandals' (2005) 23 *Wisconsin International Law Journal* 367, 376 (highlighting how CGC have tended to be either a response to the absence of governmental regulation or a justification of such absence); Melvin Eisenberg, 'The Architecture of American Corporate Law: Facilitation and Regulation' (2005) 2 *Berkeley Business Law Journal* 167, 182: “bodies of standards, principles, or rules that are promulgated by private institutions, and that have force of some sort although they are not directly backed by state sanctions”

<sup>77</sup> Preface, GERMAN CORPORATE GOVERNANCE CODE (2002), at 2, available at: [http://www.bmj.bund.de/enid/Corporate\\_Governance/German\\_Corporate\\_Governance\\_Code\\_1gj.html](http://www.bmj.bund.de/enid/Corporate_Governance/German_Corporate_Governance_Code_1gj.html) (25 September 2009)

<sup>78</sup> *Id.*

<sup>79</sup> Richard C. Nolan, 'The Legal Control of Directors' Conflicts of Interest in the United Kingdom: Non-Executive Directors Following the Higgs Report' (2005) 6 *Theoretical Inquiries in Law* 413, 418: “complex mixtures of private and public action”; Richard Mitchell, Anthony O'Donnell and Ian Ramsay, 'Shareholder Value and Employee Interests: Intersections between Corporate Governance, Corporate Law and Labor Law' (2005) 23 *Wisconsin International Law Journal* 417, at 451 (clearly distinguishing CGC from law as ‘self-regulation’ or ‘soft law’ provisions”)

<sup>80</sup> Jean du Plessis and Claus Luttermann, 'Corporate Governance in the EU, the OECD Principles of Corporate Governance and Corporate Governance in Selected Other Jurisdictions' in JJ du Plessis and others (eds), *German Corporate Governance in International and European Context* (Springer, 2007), 215.

side wide-ranging public protest against managers' self-dealing and excessive pay-packages, institutional investors have for years now been moving into the center of corporate governance rule making by developing investor protection standards.<sup>81</sup> Surely by the summer of 2002, when then-President Bush heralded "Corporate Responsibility" in the aftermath of the Enron scandals<sup>82</sup>, corporate governance regulation had come to rank high on national and transnational policy agendas.<sup>83</sup> With other countries learning about their own corpses in the closet<sup>84</sup>, the high intensity level of policy proposals, domestic and transnational law making initiatives has been no less than astounding.<sup>85</sup> The world wide academic and policy discussion of corporate governance, embedded in numerous debates in- and outside of specially empanelled expert commissions, hearings and documented by government and working group reports, symposia, articles and voluminous books, had been accompanying an active production of norms on the national and the international level.<sup>86</sup> Issues of general, even public, concern include managers' al-

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<sup>81</sup> John C. Coffee Jr., 'Liquidity versus Control: The Institutional Investor as Corporate Monitor' in KJ Hopt and E Wymeersch (eds), *European Takeovers Law and Practice* (Butterworths, 1992); G.P. Stapeldon, 'Institutional Investors: What Are Their Responsibilities as Shareholders?' in J Parkinson, G Kelly and A Gamble (eds), *The Political Economy of the Company* (Hart Publishing, 2000); Friedrich Kübler, 'Institutional Investors and Corporate Governance: A German Perspective' in T Baums, R Buxbaum and KJ Hopt (eds), *Institutional Investors and Corporate Governance* (Walter de Gruyter, 1994)

<sup>82</sup> See the ABA Presidential Task Force on Corporate Responsibility: Final Report of March 31, 2003, available at: [http://www.abanet.org/buslaw/corporateresponsibility/final\\_report.pdf](http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf). The Task Force had been appointed in 2002; see also the *Corporate Responsibility* (CORE) Coalition, founded by Amnesty International, Christian Aid, Friends of the Earth, New Economics and Traidcraft, more available at: <http://www.corporate-responsibility.org/>.

<sup>83</sup> See, THE ECONOMIST, 13 July 2002: American capitalism takes a beating; Margaret Blair, 'Post-Enron Reflections on Comparative Corporate Governance' (2002) <[http://papers.ssrn.com/paper.taf?abstract\\_id=316663](http://papers.ssrn.com/paper.taf?abstract_id=316663)>, 2-3: "Now, in the spring of 2002, the helium has come out of the formerly high-flying technology and information infrastructure sectors that were leading U.S. economic expansion in the 1990s, and the Enron fiasco and accounting scandals at numerous other corporations have exposed deep flaws in the system that was held up as the model for all the world to follow."

<sup>84</sup> Roger Adams, 'Enron to Parmalat: Now Europe needs to declare war on fraud' *International Herald Tribune* (web edition) (January 14, 2004) available at: [http://www.ihf.com/articles/2004/01/14/edadams\\_ed3\\_.php](http://www.ihf.com/articles/2004/01/14/edadams_ed3_.php): "As a result of the recent Parmalat case, European attitudes to Enron-like incidents have turned a full 180 degrees from "It can't happen here" to "It has happened — what do we do about it?""

<sup>85</sup> See, for example, the speech given by SEC Commissioner (as he then was), Paul S. Atkins, on 5 February 2003, on "The Sarbanes Oxley Act: Goals, Content, and Status of Implementation", available at: <http://www.sec.gov/news/speech/spch020503psa.htm> (25 September 2009).

<sup>86</sup> For a selection of fruitful introductions to the burgeoning corporate governance debate, see Klaus J. Hopt and

leged free-reigning authority to dispose of corporate assets as they see fit, the steep amounts of executive compensation packages<sup>87</sup> and the seemingly untamed and untamable power of corporate actors were part of sweeping policy programmes to make companies and thereby respective national economies more globally competitive.<sup>88</sup> Such transformations did not, however, occur in a vacuum. Instead, the questions central to the global debate over the convergence or divergence of corporate governance standards touched upon long-standing governance, control, legitimacy and accountability concepts characterising the large business corporation as it had been regulated in the context of distinct regulatory cultures.<sup>89</sup> The literature on these concepts is legacy and has been experiencing an exponential growth in the last years.<sup>90</sup> For the purpose of this pa-

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others (eds), *Comparative Corporate Governance. The State of the Art and Emerging Research* (Oxford University Press, 1998); Joseph A. McCahery and others (eds), *Corporate Governance Regimes. Convergence and Diversity* (Oxford University Press, 2002), and Klaus J. Hopt and others (eds), *Corporate Governance in Context. Corporations, States and Markets in Europe, Japan and the US* (Oxford University Press, 2005); see the concise overviews of the contemporary regulatory challenges within the EU by Eddy Wymeersch, 'Convergence or Divergence in Corporate Governance Patterns in Western Europe?' in JA McCahery and others (eds), *Corporate Governance Regimes Convergence and Diversity* (Oxford University Press, 2002), and Luca Enriques and Paolo Volpin, 'Corporate Governance Reforms in Continental Europe' (2007) 21 *Journal of Economic Perspectives* 117.

<sup>87</sup> See the scathing critique by Lucian Ayre Bebchuk and Jesse Fried, *Pay Without Performance. The Unfulfilled Promise of Executive Compensation* (Harvard University Press, 2004); see hereto William W. Bratton, 'The Academic Tournament over Executive Compensation' (2005) 93 *California Law Review* 1557; the scope of executive compensation, its components, allocation and disclosure continues to range high on the political agenda: see, for example, FRANKFURTER ALLGEMEINE ZEITUNG, 30 June 2008, noting a 20% general increase in CEO pay of German companies listed on the DAX index. On 5 August 2009, the new Law on the Adequacy of Executive Compensation (*Gesetz zur Angemessenheit der Vorstandsvergütung – VorstAG*) entered into force, the full text is available at: [http://www.bmj.de/files/7db813ef5ce3522d02ef3547a4c2f341/3836/gesetz\\_vorstandsverguetung\\_VorstAG.pdf](http://www.bmj.de/files/7db813ef5ce3522d02ef3547a4c2f341/3836/gesetz_vorstandsverguetung_VorstAG.pdf).

<sup>88</sup> See already Louis D. Brandeis, *The Curse of Bigness* (Viking, 1934); Ralph Nader, Mark Green and Joel Seligman, *Corporate Power in America* (Norton, 1974); Richard J. Barnett and Ronald E. Muller, *Global Reach: The Power of the Multinational Corporations* (Simon and Schuster, 1974); David C. Korten, *When Corporations Rule the World* (Barrett-Koehler Publishers and Kumerian Press, 1995).

<sup>89</sup> See Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (1932); with regard to Germany, see the excellent accounts by Detlev Vagts, 'Reforming the 'Modern Corporation': Perspectives from the German' (1966) 80 *Harvard Law Review* 23, and Thomas Raiser, 'The Theory of Enterprise Law in the Federal Republic of Germany' (1988) 36 *American Journal of Comparative Law* 111, 115, providing a concise, excellently informed brief historical outline of the regulatory development.

<sup>90</sup> William W. Bratton, 'Berle and Means Reconsidered at the Century's Turn' (2001) 26 *Journal of Corporate Law*

per, I shall only very briefly mention a number of central elements in the heightened debate over corporate governance standards before focusing more closely on the specific transnational dimension of corporate governance codes and their place in the evolving framework of corporate law making.

Corporate governance relates to the exercise of powers inside the firm: the analytical focus can, for one, be directed to the relationship between the owner (shareholder; principal) and the management (agent). Alternatively, one may focus on the overall organisational structure of the firm. While this also includes the principal-agent ties, it also encompasses the other ‘stakeholders’ in the firm, such as employees and creditors. The first, control-oriented approach centres on shareholders as the prime residual claimants of the firm: therefore, the firm’s organisation is governed by the overriding principle of maximizing ‘shareholder value’.<sup>91</sup> The other, stakeholder oriented, approach considers the actors in and around the firm and its business with regard to their vested interests in the firm. It sees the firm as *embedded* in a specific legal, economic and political culture, herein playing a role as societal actor.<sup>92</sup> In contrast to the shareholder approach, this perspective takes into account the public services rendered by a large firm in view of employment capacities and overall socio-economic spin-off.<sup>93</sup>

These two definitions lie at the base of a debate over different patterns of corporate organisation, which was for the longest time driven by an almost overwhelming belief in what some recognized as nothing less than the ‘end of history in corporate law’<sup>94</sup>, namely the eventual triumph of the shareholder value theory. The present crisis has done its part in seriously undermining this credo. However, it is important to emphasize that what might be perceived as having been a dispute merely among corporate law scholars (and policy makers), had instead long become a forum of much wider impact,

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737; Dalia Tsuk, 'From Pluralism to Individualism: Berle and Means and 20th Century American Legal Thought' (2005) 30 *Law & Social Inquiry* 179; Dalia Tsuk Mitchell, 'Legitimizing Power: The Changing Status of the Board of Directors' in P Zumbansen and C Williams (eds), *The Embedded Firm: Labour, Corporate Governance and Finance Capitalism* (forthcoming).

<sup>91</sup> Michael C. Jensen, *A Theory of the Firm. Governance, Residual Claims, and Organizational Forms* (Harvard University Press, 2000).

<sup>92</sup> John Parkinson, 'Models of the Company and the Employment Relationship' (2003) 41 *British Journal of Industrial Relations* 481.

<sup>93</sup> Sanford Jacoby, 'Corporate Governance and Society' (2005) 48 *Challenge* 69.

<sup>94</sup> Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89 *Georgetown Law Journal* 439.

as participants acknowledged the exemplary role of corporate governance for a timely and much needed scrutiny and critique of market regulation.<sup>95</sup>

## **II. The Financialization of the Economy and Global Corporate Regulatory Reform**

While this dimension of the corporate governance over convergence or divergence cannot be pursued in this paper<sup>96</sup>, it continues to form an important background for an assessment of the role of corporate governance in a larger context of market regulation. As the following section should make clear, this assessment has more and more become one of transgressing national boundaries. Drawing on the observation, for example, by the eminent U.S.-American corporate law scholar Melvin Eisenberg of the four ‘essential modules’ of corporate law, which he identifies as state statutory law, state judge-made law, federal law and private ordering through soft law,<sup>97</sup> it becomes apparent that we can no longer limit our perspectives to either traditional (hard-law oriented) or exclusively national processes of rule creation. Instead, rules and standards as developed and disseminated by transnational actors such as MNC, stock exchanges whose listing rules are of overriding importance for domestic and foreign companies, or International Organisations such as the OECD must be seen to form an integral part of the transnational law of corporate governance.<sup>98</sup>

Corporate governance codes such as those developed in countries around the world<sup>99</sup> illuminate the significant characteristics of law making processes that have been undergoing dramatic changes with regard to the *actors* involved and the *nature of the*

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<sup>95</sup> See e.g. Peter A. Gourevitch and James Shinn, *Political Power and Corporate Control. The New Global Politics of Corporate Governance* (Princeton University Press, 2005); Peter A. Hall and David Soskice (eds), *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001).

<sup>96</sup> But see the contributions in Klaus J. Hopt and others (eds), *Comparative Corporate Governance. The State of the Art and Emerging Research* (Oxford University Press, 1998), and in Jeffrey N. Gordon and Mark J. Roe (eds), *Convergence and Persistence in Corporate Governance* (Cambridge University Press, 2004); compare with the insightful discussion by John W. Cioffi, 'State of the Art: A Review Essay on Comparative Corporate Governance: The State of the Art and Emerging Research' (2000) 48 *American Journal of Comparative Law* 501.

<sup>97</sup> Melvin Eisenberg, 'The Architecture of American Corporate Law: Facilitation and Regulation' (2005) 2 *Berkeley Business Law Journal* 167, at 176

<sup>98</sup> See hereto Jennifer Hill, 'Regulatory Show and Tell: Lessons from International Statutory Regimes' (2008) 33 *Delaware Journal of Corporate Law* 819, and Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) *LSE Law, Society and Economy Working Papers* 2/2008 <http://ssrn.com/abstract=1091783>.

<sup>99</sup> See the list of codes at: [http://www.ecgi.org/codes/all\\_codes.php](http://www.ecgi.org/codes/all_codes.php) (last visited 10 June 2010).

norms generated in these processes. These developments have to be placed into the wider context of law making reform. In this respect, reform does not only concern company law but, more generally involves national, European and international attempts to improve law making procedures by allowing for a wider inclusion of private actors in rule making procedures.<sup>100</sup> What is involved from the point of view of democratic theory, is a tension that has long been growing between a functionally reduced, rubberstamping parliament on the one hand and a fast moving, hardly controllable administration which is in close contact and interaction with private actors, on the other.<sup>101</sup> At the same time, the currently widespread attempts at improving respective national laws on corporate governance and firm organisation<sup>102</sup> must be seen against the background of an allegedly overwhelming pressure of international convergence towards a set of corporate governance principles, most notably established in the US and the UK<sup>103</sup>, an effort that was for years informed by a sense of urgency

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<sup>100</sup> See, e.g., for the current endeavours on the European level, Kenneth A. Armstrong, 'Civil Society and the White Paper - Bridging or Jumping the Gaps?' in C Joerges, Y Meny and JHH Weiler (eds), *Mountain or Molehill? A Critical Appraisal on the Commission White Paper on Governance* (Harvard Law School Jean Monnet Working Paper No.6/01, 2001), 99-100: „The normative case for a more autonomised transnational civil society [...] lies in the inclusion of a new constituency of voices, interests and expertise within elite transnational governance.”; Kenneth A. Armstrong, 'Rediscovering Civil Society: The European Union and the White Paper on Governance' (2002) 8 *European Law Journal* 102, 105, qualifies the reaching out to civil society to be more than just a cure of an unsatisfactory supranational parliamentary system, but as reflecting the EU's development of 'new forms of governance'; cf. the other contributions in 8 ELJ No. 1 (March 2002); with particular emphasis on administrative law, see also Carol Harlow, 'European Administrative Law and the Global Challenge' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999), placing the analysis of contemporary admin. law against the background of 'a global context' and a definite tilt from the interventionist to the regulatory state.

<sup>101</sup> For a powerful reconstruction of the pertinent role of the administration in designing rules 'close to the ground', see the landmark assessment by James W. Landis, *The Administrative Process* (Yale University Press, 1938).

<sup>102</sup> See, hereto, the contributions in Dieter Feddersen, Peter Hommelhoff and Uwe H. Schneider (eds), *Corporate Governance. Optimierung der Unternehmensführung und der Unternehmenskontrolle im deutschen und amerikanischen Aktienrecht* (Otto Schmidt, 1996); Klaus J. Hopt and Eddy Wymeersch, *Comparative Corporate Governance - Essays and Materials* (Walter de Gruyter, 1997); Theodor Baums (ed), *Bericht der Regierungskommission Corporate Governance. Unternehmensführung, Unternehmenskontrolle, Modernisierung des Aktienrechts* (Otto Schmidt, 2001), Introduction; see, for a list of worrying items in German corporate governance, e.g., Marcus Lutter, 'Die Kontrolle der gesellschaftsrechtlichen Organe: Corporate Governance - ein internationales Thema' (2002) 24 *Jura* 83, at 85.

<sup>103</sup> See, Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89 *Georgetown Law Journal* 439; critically Douglas M. Branson, 'The Very Uncertain Prospect of 'Global' Convergence in



with regard to adapting stakeholder-oriented, closely knit, bank-financed corporate governance systems to an extremely volatile competition for globally available investments and is now, at the time of this writing, shaped anew by widespread concerns with the consequences and externalities of the finance capitalism of the last twenty years. As comparative corporate governance scholars continue to be busied with assessments of the post-reform prospects of central building blocks of the different regulatory architectures such as the two-tier system of supervisory and management board<sup>104</sup> in German corporate governance, employee representation<sup>105</sup> and the role of banks<sup>106</sup>, we can recently discern a distinct reorientation in focus. On the one hand, there

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Corporate Governance' (2001) 34 *Cornell International Law Journal* 321; Sanford M. Jacoby, 'Corporate Governance in Comparative Perspective: Prospects for Convergence' (2002, forthcoming) *Comparative Labor Law & Policy Journal*; see, for an instructive comparison, Steven N. Kaplan, 'Corporate Governance and Corporate Performance: A Comparison of Germany, Japan and the U.S.' in KJ Hopt and E Wymeersch (eds), *Comparative Corporate Governance Essays and Materials* (Walter de Gruyter, 1997); Sigurt Vitols, 'Varieties of Corporate Governance: Comparing Germany and the UK' in PA Hall and D Soskice (eds), *Varieties of Capitalism The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001).

<sup>104</sup> See, e.g., Klaus J. Hopt, 'Corporate Governance und deutsche Universalbanken' in D Feddersen, P Hommelhoff and UH Schneider (eds), *Corporate Governance Optimierung der Unternehmensführung und der Unternehmenskontrolle im deutschen und amerikanischen Aktienrecht* (Otto Schmidt, 1996), 3, underlining the far reaching nexus with the disputed system of co-determination; see also Klaus J. Hopt, 'The German Two-Tier Board (Aufsichtsrat): A German View on Corporate Governance' in KJ Hopt and E Wymeersch (eds), *Comparative Corporate Governance Essays and Materials* (Walter de Gruyter, 1997), 10, 17 f.; Peter O. Mülbert, 'Bank Equity Holdings in Non-Financial Firms and Corporate Governance: The Case of German Universal Banks' in KJ Hopt and others (eds), *Comparative Corporate Governance The State of the Art and Emerging Research* (Oxford University Press, 1998), 362, 364 ff., discussing the claim that the supervisory board had traditionally been weakened in order to refrain employees' influence within the firm.

<sup>105</sup> Thomas Raiser, 'The Theory of Enterprise Law in the Federal Republic of Germany' (1988) 36 *American Journal of Comparative Law* 111, 114; Katharina Pistor, 'Codetermination: A Sociopolitical Model with Governance Externalities' in M Blair and MJ Roe (eds), *Employees and Corporate Governance* (Brookings Institution, 1999); Jean du Plessis and Otto Sandrock, 'The German System of Supervisory Codetermination by Employees' in JJ du Plessis and others (eds), *German Corporate Governance in International and European Context* (Springer, 2007).

<sup>106</sup> See, e.g., Klaus J. Hopt, 'Corporate Governance und deutsche Universalbanken' in D Feddersen, P Hommelhoff and UH Schneider (eds), *Corporate Governance Optimierung der Unternehmensführung und der Unternehmenskontrolle im deutschen und amerikanischen Aktienrecht* (Otto Schmidt, 1996), 246, rejecting the commonly made claim of strongest, intimate ties between German firms and their "Hausbanken"; see also Theodor Baums, 'Corporate Governance in Germany - System and Recent Developments' in M Isaksson and R Skog (eds), *Aspects of Corporate Governance* (Juristförlaget, 1994), 31 ff.; Peter O. Mülbert, 'Bank Equity

can be no doubt that the intermittently lively interest in comparative corporate governance, convergence or divergence and the alleged triumph of shareholder primacy has given way to a considerably more sober look at how we arrived in the present crisis. A new excellent study on the comparative evolution of U.S. and German corporate governance frames its conceptual orientation as well as the concluding analysis firmly in the context of the present financial crisis.<sup>107</sup> This sensitivity to timeliness, however, is anything but coincidental. Instead, it is owed to the ‘financialisation’ of the corporation and the far-reaching overtaking of corporate law by corporate finance concepts, that has marked the last twenty years of corporate governance reform, which seem to have been firmly steeped in the belief of adapting the business corporation to the dynamics of global capital markets.<sup>108</sup> To be sure, this reform orientation can be read as *one* possible reaction to the deep-running transformation of Western welfare states, to the erosion of social security and the breaking-up of embedded, long-grown business-finance networks that shaped, for example, the stunning success of ‘Germany Inc.’ At the same time, however, the financialisation of the global economy and the rise of shareholder value as the dominant paradigm in corporate governance marked a distinct adoption of a narrow and reductionist conception of the firm. As we are now witnessing a global introspection into the causes of the crisis, there is an important opportunity to revisit the recent trajectory of corporate governance reform in light of the dire consequences of the exuberant subjection of the business corporation to the insatiable appetite of capital markets.<sup>109</sup> The promising prospects of the current crisis are the emerging opportunities to see beyond singular stories of outrageous, scandalous conduct in order to take into view the connections between pursued policies and market outcomes. As John Braithwaite noted recently, “The ritual for blaming someone for failures that are system failures is ritualistic in the sense that it seeks to calm critics by giving them a fall guy to chew on instead of fixing the problem.”<sup>110</sup>

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Holdings in Non-Financial Firms and Corporate Governance: The Case of German Universal Banks' in KJ Hopt and others (eds), *Comparative Corporate Governance The State of the Art and Emerging Research* (Oxford University Press, 1998), 447 ff.

<sup>107</sup> John W. Cioffi, *Public Law and Private Power: Corporate Governance Reform in the United States and Germany in an Age of Finance Capitalism* (Cornell University Press, forthcoming).

<sup>108</sup> Ronald Dore, 'Financialization of the Global Economy' (2008) 17 *Industrial and Corporate Change* 1097; Ewald Engelen, 'The Case for Financialization' (2008) 12 *Competition and Change* 111.

<sup>109</sup> See e.g. the contributions to P Zumbansen/C Williams (eds.), *The Embedded Firm: Corporate Governance, Labour and Financial Capitalism* (forthcoming).

<sup>110</sup> John Braithwaite, *Regulatory Capitalism. How it Works, Ideas for Making it Work Better* (Edward Elgar, 2008), 150.

These connections can no longer solely be studied within contained, embedded systems of national political economies. Instead, there is a growing awareness of the fact that the adaptations of historically evolved governance systems display a particular *transnational* dimension. In light of the globally intertwined business and interaction among firms created under different legal rules, corporate governance rules have increasingly become a competitive asset on a ‘law market’<sup>111</sup>, a market, however, that is not only constituted by sovereign sellers with vested authority in the creation of binding legal norms, but by an amalgamation of national governments, supranational norm setting institutions such as the OECD or the UN Global Compact as well as a private parties such as multinational corporations and interest group representations. This particularly global regulatory landscape has not failed to capture the imagination of scholars of comparative law<sup>112</sup>, regulatory theory<sup>113</sup> and institutional analysis.<sup>114</sup> So, while the current crisis must rightly be perceived as a failure of regulation and state action<sup>115</sup>, it can no longer be denied that reactions to the crisis, including the calls for ‘tougher regulation’ as recently promulgated by political leaders around the world, will unfold in a tightly intervoven space of governmental collaboration and interaction.<sup>116</sup> In the field of corporate governance the landscape is not only populated by national governments eagerly engaged in a headstrong pursuit of regulatory reform; complementing such efforts is a vast proliferation of private and mixed public/private, hybrid processes of rule making cutting across jurisdictional boundaries and contributing to an increasingly densely woven net of guidelines, best practices, and standards. The defining feature of the emerging transnational body of corporate governance norms is the intricate resurfacing of a series of paradoxes pertaining to the inseparability of substantive/procedural, coordinative/regulatory and authority/affectedness aspects of the norms in question. In order to illustrate the theoretical challenge facing any legal theory that wishes to explain the norm creation dynamics in this area, our analysis cannot be confined to the *substantive* law governing specific forms of societal activity, which has long remained the hallmark of comparative work in the law of cor-

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<sup>111</sup> Erin A. O'Hara and Larry E. Ribstein, *The Law Market* (Oxford University Press, 2009).

<sup>112</sup> Jennifer Hill, 'Regulatory Show and Tell: Lessons from International Statutory Regimes' (2008) 33 *Delaware Journal of Corporate Law* 819.

<sup>113</sup> Julia Black and David Rouch, 'The development of global markets as rule-makers: engagement and legitimacy' (2008) *Law and Financial Markets Review* 218.

<sup>114</sup> See e.g. the recent monographical study by Andreas Busch, *Banking Regulation and Globalization* (Oxford University Press, 2009) with case studies on the U.S., Germany, the UK and Switzerland.

<sup>115</sup> Busch, preceding note; Cioffi (2009), above.

<sup>116</sup> Howard Davies and David Green, *Global Financial Regulation. The Essential Guide* (Polity, 2008).

porate governance<sup>117</sup>; rather, our attention has to turn as well to the dynamics that are unfolding between different levels and sites of rule making from a *regulatory* perspective. From this combined perspective, the law of corporate governance becomes a prime example of a *transnational law regime*. The intricate embeddedness of regulatory innovation in locally defined governance structures on the one hand, and their integration in transnationally unfolding rule making processes is characteristic of the current regulatory landscape in corporate governance, as illustrated by the particular dynamics of corporate governance codes. From this perspective, codes are a powerful example of the way in which private ordering maintains an intricately challenging tension with the institutional frameworks for official law making.

### **III. Law Making in Corporate Governance: The Example of the German Corporate Governance Code**

On June 21, 2002, the German chamber of federal states („*Länder*”), the *Bundesrat*, approved of a bill which had prior to that passed the national parliament („*Bundestag*”), and which introduced a number of substantial changes to the German *Aktiengesetz* [Stock Corporation Act].<sup>118</sup> This particular statute had to a large degree been contemplated and prepared under the auspices of two specially formed governmental commissions concerned with a reform of German corporate governance. The second of these commissions, the so-called ‘Corporate Governance Code-Commission’, had been convened with the mandate of taking up the suggestions of the first commission, central to which was the drafting of a voluntary Code of Corporate Governance Rules. This second commission was chaired by Mr Gerhard Cromme, Spokesman of the supervisory’s board of German steel manufacturer ThyssenKrupp,<sup>119</sup> who presented its work on 26 February 2002 to the Ministry of Justice.<sup>120</sup>

Among the many interesting features of the German Corporate Governance Code, which a renowned German corporate governance scholar coined a ‘novum’ in the

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<sup>117</sup> See the excellent study by Detlev Vagts, 'Reforming the 'Modern Corporation': Perspectives from the German' (1966) 80 *Harvard Law Review* 23.

<sup>118</sup> See the *Gesetz zur weiteren Reform des Aktien- und Bilanzrechts, zu Transparenz und Publizität (Transparenz- und Publizitätsgesetz – abbr. TraPuG)* [Transparency and Disclosure Act], adopted by the German Bundestag on May 17, 2002. See also the documentation in *Neue Zeitschrift für Gesellschaftsrecht (NZG)*, 2002, 78-81, and the comprehensive presentation of the TraPuG’s main elements by Heribert Hirte, *Das Transparenz- und Publizitätsgesetz* (Beck, 2003).

<sup>119</sup> See the relevant information on the Commission at: <http://www.corporate-governance-code.de/index-e.html>.

<sup>120</sup> See press release at: <http://www.corporate-governance-code.de/eng/news/presse-20020226.html>.

system of German legal sources<sup>121</sup>, is its intricate and still largely unresolved legal nature.<sup>122</sup> The following section will approach a possible answer to this question in the larger context of corporate governance reform as it has been pursued on the domestic, European and transnational levels on the one hand and of a distinctly legal sociological perspective under the proposed heading of ‘transnational legal pluralism’, on the other.<sup>123</sup>

Ever since the time of its publication in 2002, the German Corporate Governance Code has prompted a vivid debate about its legal or, perhaps, non-legal nature, with assessments ranging from ‘soft law’<sup>124</sup> to ‘unconstitutional’.<sup>125</sup> That this debate has still not subsided<sup>126</sup> might be explained in light of the particular novelty that the arrival of the idea of a code constituted in Germany.<sup>127</sup> At the same time, its creation could be seen as having been partaking in a worldwide surge of the drafting and promulgating of corporate governance codes.<sup>128</sup>, but also the Code’s rather straight-forward normative design. The Code itself includes those *norms* and *regulations* that are mandatory corporate law rules which are already set out in the German Stock Corporation Law.

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<sup>121</sup> Peter Ulmer, 'Der deutsche Corporate Governance Kodex - ein neues Regulierungsinstrument für börsennotierte Aktiengesellschaften' (2002) 166 *ZHR* 150, 152.

<sup>122</sup> Eberhard Vetter, 'Der Deutsche Corporate Governance Kodex nur ein zahnloser Tiger? Zur Bedeutung von § 161 AktG für Beschlüsse der Hauptversammlung' (2008) *Neue Zeitschrift für Gesellschaftsrecht [NZG]* 121, 121: „still not resolved satisfyingly“.

<sup>123</sup> See already Peer Zumbansen, 'New Governance' in European Corporate Governance Regulation as Transnational Legal Pluralism' (2008b) 15 *European Law Journal* 246, and Peer Zumbansen, 'Spaces and Places: A Systems Theory Approach to Regulatory Competition in European Company Law' (2006) 12 *European Law Journal* 534.

<sup>124</sup> Marcus Lutter, 'Vergleichende Corporate Governance - Die deutsche Sicht' (2001) 30 *European Company Law Review [ECLR - ZGR]* 224, 225; critically hereto: Ulmer (2002), above, 161.

<sup>125</sup> Wolfgang Seidel, 'Kodex ohne Rechtsgrundlage' (2004) *Neue Zeitschrift für Gesellschaftsrecht [NZG]* 1095.

<sup>126</sup> See e.g. Jean du Plessis and Ingo Sanger, 'An Overview of the Corporate Governance Debate in Germany' in JJ du Plessis and others (eds), *German Corporate Governance in International and European Context* (Springer, 2007), 31: “serious concerns with regard to the constitutionality of the Code.”

<sup>127</sup> Axel von Werder, 'Preamble to the Commentary on the German Corporate Governance Code, 3rd ed.' in H-M Ringleb and others (eds), *Kommentar zum Deutschen Corporate Governance Kodex Kodex-Kommentar (3rd ed)* (CH Beck, 2008), 15, annotation 6.

<sup>128</sup> See e.g. Axel von Werder, 'Preamble to the Commentary on the German Corporate Governance Code, 3rd ed.' in H-M Ringleb and others (eds), *Kommentar zum Deutschen Corporate Governance Kodex Kodex-Kommentar (3rd ed)* (CH Beck, 2008), who situates the creation of the German Code within the larger context of a veritable ‘international code movement’, *id.* at 14. See also the list of corporate governance codes listed on the website of the European Corporate Governance Institute ([http://www.ecgi.org/codes/all\\_codes.php](http://www.ecgi.org/codes/all_codes.php))

The Code's purpose, according to its Drafters, in reiterating these norms here is to provide foreign investors with a transparent and simple introduction to central rules pertinent to the corporate governance rules existing in Germany.<sup>129</sup> Furthermore, the Code includes *recommendations*, which are expressed by the word "*sollen*" (shall) and the observation of which is to be made transparent in an annual statement made by the firm's management.<sup>130</sup> Lastly, the Code contains *suggestions* as to corporate conduct the observation of which is merely 'suggested' but there is no obligation to disclose whether a company has followed these suggestions.<sup>131</sup> The '*comply or disclose*' principle which is endorsed in the Code with regard to "recommendations" has been seen as an indirect enforceability anchor in the Code, whereby it could be seen to lose its genuinely voluntary character.<sup>132</sup> That the Code in fact attains an at least indirect mandatory character, is strengthened by the enactment of Section 161 in the German Stock Corporation Act (AktG), whereby the legislature actually introduced the disclosure duty into codified law.<sup>133</sup> But, does this suffice to make the Code a piece of enforceable legislation? Others have argued, that even if there is a disclosure obligation with regard to the company's compliance with the Code's recommendations, it would be wrong to perceive the Code itself as 'law'. The latter, so it was argued<sup>134</sup>, would only

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<sup>129</sup> German Corporate Governance Code, Foreword, <http://www.corporate-governance-code.de/eng/kodex/1.html>: "This German Corporate Governance Code (the "Code") presents essential statutory regulations for the management and supervision (governance) of German listed companies and contains internationally and nationally recognized standards for good and responsible governance. The Code aims at making the German Corporate Governance system transparent and understandable. Its purpose is to promote the trust of international and national investors, customers, employees and the general public in the management and supervision of listed German stock corporations."

<sup>130</sup> See the *German Corporate Governance Code*, Preface, 2, available at <http://www.corporate-governance-code.de/index-e.html>.

<sup>131</sup> *Id.*

<sup>132</sup> Wolfgang Seidel, 'Der Deutsche Corporate Governance Kodex - eine private oder doch eine staatliche Regelung?' (2004) 25 *Zeitschrift für Wirtschaftsrecht [ZIP]* 285; Wolfgang Seidel, 'Kodex ohne Rechtsgrundlage' (2004) *Neue Zeitschrift für Gesellschaftsrecht [NZG]* 1095; Markus Heintzen, 'Der Deutsche Corporate Governance Kodex aus der Sicht des deutschen Verfassungsrechts' (2004) 25 *Zeitschrift für Wirtschaftsrecht [ZIP]* 1933

<sup>133</sup> See, *supra*. The quality and assessment of this obligatory annual 'explanation' must certainly be disputed, see, e.g., Martin Peltzer, 'Handlungsbedarf in Sachen Corporate Governance' (2002) *Neue Zeitschrift für Gesellschaftsrecht [NZG]* 593, 594; regrettably, the just published, leading commentary on German stock corporation law, by Uwe Hüffer, remains silent on this new codification, see Uwe Hüffer, *Aktiengesetz* (5. Aufl. edn C.H.Beck, 2002), § 161 AktG.

<sup>134</sup> Henrik-Michael Ringleb, Introduction, in: Henrik-Michael Ringleb and others, *Kommentar zum Deutschen Cor-*

then be the case, if the recommendations themselves were being made obligatory which, arguably, they are not.<sup>135</sup> These opposed viewpoints illustrate the underlying central difficulty: It is clear, that the Code's practical relevance is to be seen in its effect on the actual *behaviour* of firms<sup>136</sup>, something which appears to have continuously accrued with each passing year.<sup>137</sup> Whether or not firms do comply with the code's dispositions relating, eg, to transparency and disclosure of executive compensation<sup>138</sup> (a part of the *Kodex* that spurred concrete legislative action leading up to the entering into force of a federal statute on the adequacy of executive compensation in August 2009<sup>139</sup>), the publication of the firm's reports on the Internet<sup>140</sup>, or the facilitating of personal exercise of shareholders' voting rights<sup>141</sup> will, according to the rules established by the Code, remain within the discretion of the company.<sup>142</sup> Again, the Code explicitly foresees that companies do not have to comply with 'recommendations'. And yet they are *obliged* – under Section 161 AktG – to issue an annual explanation whether or not they did comply.<sup>143</sup> The annual monitoring of the Code's 'acceptance' has revealed consistently growing numbers of German major corporations to observe the Code.<sup>144</sup>

A systematic interpretation alone of the Code's three-fold structure with *information*, *recommendations* and *suggestions*, which would aim at determining the legal nature of

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*porate Governance Kodex [Kodex-Kommentar]* (C.H.Beck, 2nd ed., 2005); Axel von Werder, 'Der Deutsche Corporate Governance-Kodex - Grundlagen und Einzelbestimmungen' (2002) 55 *Der Betrieb* 801; Christoph H. Seibt, 'Deutscher Corporate Governance Kodex und Entsprechenserklärung (§ 161 AktG-E)' (2002) 47 *Die Aktiengesellschaft (AG)* 249.

<sup>135</sup> Marcus Lutter, 'Die Kontrolle der gesellschaftsrechtlichen Organe: Corporate Governance - ein internationales Thema' (2002) 24 *Jura* 83, 86, with regard to informations and suggestions.

<sup>136</sup> Christoph H. Seibt, 'Deutscher Corporate Governance Kodex: Antworten auf Zweifelsfragen der Praxis' (2003) 48 *Die Aktiengesellschaft (AG)* 465.

<sup>137</sup> Jürgen van Kann and Mira Eigler, 'Aktuelle Neuerungen des Corporate Governance Kodex' (2007) *Deutsche Zeitschrift für Steuerrecht* 1730, 1733.

<sup>138</sup> Very critically hereto Martin Wolf, 'Corporate Governance. Der Import angelsächsischer "Self-Regulation" im Widerstreit zum deutschen Parlamentsvorbehalt' (2002) 35 *Zeitschrift für Rechtspolitik (ZRP)* 59, 60.

<sup>139</sup> See *Gesetz zur Angemessenheit der Vorstandsvergütung – VorstAG*; full text at: [http://www.bmj.de/files/7db813ef5ce3522d02ef3547a4c2f341/3836/gesetz\\_vorstandsverguetung\\_VorstAG.pdf](http://www.bmj.de/files/7db813ef5ce3522d02ef3547a4c2f341/3836/gesetz_vorstandsverguetung_VorstAG.pdf).

<sup>140</sup> See e.g., Section 2.3.1 of the Cromme's commission's German Corporate Governance Code.

<sup>141</sup> German Corporate Governance Code, Section 2.3.3.

<sup>142</sup> German Corporate Governance Code, Section 1: Foreword, differentiating between voluntary recommendations ("shall"), suggestions ("should", "can"), and legally compelling provisions, according to existing law.

<sup>143</sup> See Section 16 *Transparency and Disclosure Act*.

<sup>144</sup> Van Kann & Eigler (2007), above, 1733.

each of the Code's components in concert with the others and, lastly, within the general structure of the Code, does not appear to yield a clear-cut result. While the merely informative sections on the one hand and the suggestions on the other can remain outside the gambit of such a line of inquiry, the Code's recommendations invite further inspection. The mentioned disclosure obligation is in itself intriguing, if not problematic<sup>145</sup>: While identifying criminal sanctions against the disclosing director in the case of an incorrect declaration (Section 400 AktG), neither the Statute nor the Code contains any means of how such incorrectness should be ascertained. This can be interpreted as meaning that the legislator could not wish to or did not imagine how to put in place a tight monitoring system that goes beyond the registration of whether the declaration has been made at all, the failure of which is sanctioned in the *Handelsgesetzbuch* (HGB - Commercial Code). What is likely, then, is that the legislator, keeping in line with the regulatory spirit of the Code itself, did in turn aim at inducing an *indirect* enforcement mechanism into the law, the functionality of which, however, is unfolding entirely outside of the statutory realm. Where companies would fail to correctly disclose their compliance or non-compliance, so it might be argued, the market, that is the investors, will adequately act on this communication. Surely, such a perspective is not without problems: even if in theory the market were to react to an incorrectly or not at all issued declaration by devaluing the company's shares, there would still remain considerable burden of proof challenges to establish liability.<sup>146</sup> Rejecting as well a number of other legal grounds for liability due to the legal – non-binding – nature of the Code<sup>147</sup>, the effect of Section 161 would merely be the initiation of a *shaming* process, playing out on a *market for reputation*. From this perspective, however, it remains doubtful, how the Stock Corporation Act, a statutory public norm, which commands a private actor, here a stock corporation, to annually disclose whether it has complied with a non-binding set of recommendations, can be compatible with an enforcement process through shaming, which unfolds outside of the state.

But, perhaps, this perspective is inadequate to capture the particular combination of coordinative/regulatory dimensions reflected in the Code. The preceding discussion suggests how our conceptualisation of the enforcement qualities of the Corporate Governance Code is informed by our understanding of the distinction between a statutory

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<sup>145</sup> For a list of the extensive, even monographical literature on this provision, see Gerald Spindler, 'Commentary to § 161 AktG' in K Schmidt and M Lutter (eds), *Aktiengesetz Kommentar* (Otto Schmidt, 2008), before annotation 1.

<sup>146</sup> Gerald Spindler, 'Commentary to § 161 AktG' in K Schmidt and M Lutter (eds), *Aktiengesetz Kommentar* (Otto Schmidt, 2008), annotation 63.

<sup>147</sup> Spindler (2008), above, annotations 63-77.



norm of law set by the state on the one hand and a non-binding norm of non-law on the other. The linkage between law and non-law as it is being established by Section 161 leads us to further entrench this unquestioned distinction where, perhaps, we should recognise that it was an inappropriate one to begin with. Whether or not the Code is law, might not be answerable with regard to its enforcement mechanism, but perhaps better with view to its authorship. It is here, where the relevance of the above proposed RCRC model to depict such incremental ways of rule making becomes central. We will lay this out in detail in the following section.

### ***1. Who – Really – Makes Company Law?***

If the answer whether or not a norm is to be recognised as law, depends on the authoritative process to enact legal norms, then a closer look must be taken at the process through which the Corporate Governance Code was enacted. Under German constitutional law, the right to initiate legislative proposals lies with the government and with the *Bundestag* and the *Bundesrat*, the federal parliament and the representation of the Federal states respectively.<sup>148</sup> This in fact was the starting observation of those scholars who are opposed to any norm-making by private expert groups. These scholars identified instances where a government seeks societal approval for envisioned legislative projects from private interest groups as examples of an on-going and proliferating ‘deparlamentarisation’.<sup>149</sup> Their critique was directed, in particular, against the norm-production by societal groups such as expert groups, commissions or associations the work of which is at times based on an ambivalent forms of public authorisation.<sup>150</sup>

This skepticism, however, appears overdrawn, by many accounts. First of all, it has long been recognised by administrative and constitutional law scholars, that the state is highly dependent on the expert input from societal actors in carrying out its legislative

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<sup>148</sup> See, Art. 76 para. 2 *Grundgesetz* (German Basic Law), available at: [http://www.uni-wuerzburg.de/law/gm00000\\_.html](http://www.uni-wuerzburg.de/law/gm00000_.html) (27 July 2006).

<sup>149</sup> See, Martin Wolf, 'Corporate Governance. Der Import angelsächsischer "Self-Regulation" im Widerstreit zum deutschen Parlamentsvorbehalt' (2002) 35 *Zeitschrift für Rechtspolitik (ZRP)* 59, and Paul Kirchhof, 'Demokratie ohne parlamentarische Gesetzgebung?' (2001) 54 *Neue Juristische Wochenschrift (NJW)* 1332; Paul Kirchhof, 'Gesetzgebung und private Regelsetzung als Geltungsgrund für Rechnungslegungspflichten?' (2000) 29 *Zeitschrift für Unternehmensrecht [ZGR]* 681, 690.

<sup>150</sup> Kirchhof, *Demokratie ohne parlamentarischen Gesetzgeber* (2001), above, arguing that parliaments, not such private commissions are mandated to produce legal norms; see also Wolfgang Seidel, 'Kodex ohne Rechtsgrundlage' (2004) *Neue Zeitschrift für Gesellschaftsrecht [NZG]* 1095, arguing that the Code remains a public norm, which was drafted without proper law-making authority.

and administrative functions.<sup>151</sup> Furthermore, it is clear that with the growing complexity of societal relations and, correspondingly, a growing demand for sophisticated and context-sensitive public governance forms<sup>152</sup>, any form of norm-production and implementation has become an extremely fragile process of risk-taking and of trial-and-error. In the light of the particular governance challenges arising in contemporary, complex societies<sup>153</sup>, an allegedly clear-cut distinction between public and private governance schemes, built on the image of a sovereign, knowledgeable state presiding over a fragmented, market-society, would fail to grasp the intricate forms of public-private governance mechanisms, of knowledge sharing and experimental politics that characterise contemporary law making.<sup>154</sup> In this light, the insistence on the state keeping a safe distance from private knowledge, bears little explanatory value for our understanding of contemporary forms of governance.

The second strand of critique mounted against corporate governance codes and the associated form of private law making targeted the real *effect* emanating from such codes and practices. Given the already alluded-to complex regulatory nature of the Code, it is not surprising that it met with severe critique regarding its purportedly absent legislative authorial basis.<sup>155</sup> While some expressed their support of this form of

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<sup>151</sup> See already Richard B. Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1669; Jody Freeman, 'Collaborative Governance in the Administrative State' (1997) 45 *University of California at Los Angeles Law Review* 1.

<sup>152</sup> Gunther Teubner, 'Juridification - Concepts, Aspects, Limits, Solutions' in G Teubner (ed) *Juridification of Social Spheres* (Walter de Gruyter, 1987); Karl-Heinz Ladeur, 'The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law' (1999) *EUI Working Paper Law No 99/3*

<sup>153</sup> See only Ulrich Beck, 'From Industrial Society to Risk Society: Questions of Survival, Social Structure and Ecological Enlightenment' (1992) 9 *Theory, Culture & Society* 97.

<sup>154</sup> See, eg, Michael Power, *The Audit Society: Rituals of Verification* (Oxford University Press, 1997); Michael Power, 'Enterprise Risk Management and the Organization of Uncertainty in Financial Institutions' in KK Cetina and A Preda (eds), *The Sociology of Financial Markets* (Oxford University Press, 2005).

<sup>155</sup> See Wolfgang Seidel, 'Der Deutsche Corporate Governance Kodex - eine private oder doch eine staatliche Regelung?' (2004) 25 *Zeitschrift für Wirtschaftsrecht [ZIP]* 285; Paul Kirchhof, 'Das Parlament als Mitte der Demokratie' in PM Huber, M Brenner and M Möstl (eds), *Der Staat des Grundgesetzes - Kontinuität und Wandel Festschrift für Peter Badura zum 70 Geburtstag* (Mohr Siebeck, 2004); Ulrich Noack, 'Neuerungen im Recht der Hauptversammlung durch das Transparenz- und Publizitätsgesetz und den Deutschen Corporate Governance Kodex' (2002) 55 *Der Betrieb [DB]* 620, 620, calling the Code drafted by the Cromme-Commission, 'a peculiar set of rules' ("ein Regelwerk von eigenartiger Gestalt"); Martin Peltzer, 'Handlungsbedarf in Sachen Corporate Governance' (2002) *Neue Zeitschrift für Gesellschaftsrecht [NZG]* 593, 593, highlights the fact that the Code has been drafted without a legislative authorization nor democratic legitimization; see, even more polemically,

installing a forum in order to solicit dispersed and urgently needed expertise, feeding into concrete law making proposals for the Federal legislature,<sup>156</sup> others pointed to various drawbacks of this particular form of law making.<sup>157</sup> One of the main contentions concerned the alleged ‘exclusion’ of the parliament from the actual process of conceptualizing and preparing of the legislative proposal.<sup>158</sup> In this respect, it was alleged that the soliciting of experts into the open parliamentary arena would make the law’s genesis more transparent and, ultimately, render it more legitimate.<sup>159</sup> Another critical issue concerned the fundamental question whether or not a private body of experts is or should in fact be entitled and authorised to draw up binding law.<sup>160</sup>

This critique mounted against ‘private’ law making bodies such as the two recent government commissions on corporate governance is not so easily refuted. The core issue appears to be whether or not privately enacted norms may be given binding effect towards third parties to the norm generation. While an intuitive answer would suggest a clear “no”, the matter at stake here does indeed escape such a straight-forward assessment. While it is a common place in private law that contractual obligations concern foremost and only the contracting parties<sup>161</sup>, we have been witnessing a decisive

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Paul Kirchhof, 'Demokratie ohne parlamentarische Gesetzgebung?' (2001) 54 *Neue Juristische Wochenschrift (NJW)* 1332.

<sup>156</sup> See, eg, Theodor Baums, 'Interview: Reforming German Corporate Governance: Inside a Law Making Process of a Very New Nature' (2001) 2 *German Law Journal* at: [http://www.germanlawjournal.com/past\\_issues.php?id=43](http://www.germanlawjournal.com/past_issues.php?id=43).

<sup>157</sup> See, eg, Martin Wolf, 'Corporate Governance. Der Import angelsächsischer "Self-Regulation" im Widerstreit zum deutschen Parlamentsvorbehalt' (2002) 35 *Zeitschrift für Rechtspolitik (ZRP)* 59, 59, 60; in the same vein Paul Kirchhof, 'Demokratie ohne parlamentarische Gesetzgebung?' (2001) 54 *Neue Juristische Wochenschrift (NJW)* 1332, 1332, 1333, critically observing a ‘deparlamentarization’ (*Entparlamentisierung*) both with regard to the EU’s (i.e. the Council’s) appropriation of law making sectors formerly reserved by the Member States and the executive’s practice on the national level of seeking consensus with market players before pushing this consensus through the parliament; see already *idem.*, *ZGR* 2000, 609; for a thorough discussion of private law making, See Ferdinand Kirchhof, *Private Rechtsetzung* (Duncker & Humblot, 1987); in the U.S. American context, the canonical text is Louis Jaffe, 'Law Making by Private Groups' (1937) 51 *Harvard Law Review* 201, 1 ff.; see also Freeman, Symposium: The Contracting State; *idem.*, The Private Role in Public Government.

<sup>158</sup> See, Martin Wolf, 'Corporate Governance. Der Import angelsächsischer "Self-Regulation" im Widerstreit zum deutschen Parlamentsvorbehalt' (2002) 35 *Zeitschrift für Rechtspolitik (ZRP)* 59, Paul Kirchhof, 'Demokratie ohne parlamentarische Gesetzgebung?' (2001) 54 *Neue Juristische Wochenschrift (NJW)* 1332.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> See, e.g., Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999), 23; Michael Bäuerle, *Vertragsfreiheit und Grundgesetz. Normativität und Faktizität individueller Vertragsfreiheit in verfassungs-*

evolutionary development in the public (constitutional) governance of private contract law towards a recognition of the larger social role played by private transactions.<sup>162</sup> Indeed, it is a frequent element of private law arrangements, that contracts between two (or more) parties have effects upon third parties to the contractual agreement.<sup>163</sup> And yet, the here suggested connection between contractual ‘private ordering’ and the norm setting by commissions might, however, be misleading. As we have seen, it is not entirely clear, whether or not the commissions are in fact ‘private’ by nature. This can be doubted at least in those cases where government officials are participating in the commission’s work, such as was the case in the first Commission of 2000-2001.<sup>164</sup>

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*rechtlicher Perspektive* (Nomos, 2001), 65, describing the different ordering function of private (contract) law and public (administrative) law; see also Murray Hunt, 'Constitutionalism and the Contractualisation of Government in the United Kingdom' in M Taggart (ed) *The Province of Administrative Law* (Hart Publishing, 1997), 38, recognizing both the need and the emergence of a 'modern conception of constitutionalism', which reaches beyond a strictly parliamentary vision of law making; see also Martin Peltzer, 'Corporate Governance Codices als zusätzliche Pflichtenbestimmung für den Aufsichtsrat' (2002) 5 *Neue Zeitschrift für Gesellschaftsrecht [NZG]* 10, 11.

<sup>162</sup> See, hereto, Murray Hunt, 'Constitutionalism and the Contractualisation of Government in the United Kingdom' in M Taggart (ed) *The Province of Administrative Law* (Hart Publishing, 1997); Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999), 46 ff.; Michael Bäuerle, *Vertragsfreiheit und Grundgesetz. Normativität und Faktizität individueller Vertragsfreiheit in verfassungsrechtlicher Perspektive* (Nomos, 2001), 121, 123 ff.; Dieter Hart, 'Einleitung vor §§ 116 ff. BGB' in R Wassermann (ed) *Alternativkommentar BGB, 1 Band* (Luchterhand, 1987); Dieter Hart, 'Zur konzeptionellen Entwicklung des Vertragsrechts' (1984) 29 *Die Aktiengesellschaft (AG)* 66; see Hestermeyer, Report on the BGH's Jurisprudence in Private Law, in: *The Annual of German & European Law* (R Miller/P Zumbansen eds., Berghahn: Oxford/New York 2004), Section C II.

<sup>163</sup> See, eg, the jurisprudence of the *Bundesgerichtshof* (BGH - Federal Court of Justice) concerning third party effects of expert testimony contracts: BGH, JZ 2000, p. 725; earlier BGH, in: *NEUE JURISTISCHE WOCHENSCHRIFT (NJW)* 1979, p. 1595; BGH, in *NJW* 1982, p. 2431, and BGH, in *NJW* 1984, p. 355; BGHZ 127, 378; BGHZ 138, 157; see also BGHZ 133, 168; for a discussion of this jurisprudence, see Basil Markesinis and Hannes Unberath, *The German Law of Torts, 5th Ed.* (Hart Publishing, 2002), pp. 265-288; Peer Zumbansen, 'Drittschützende Wirkung eines Anwaltvertrages und verdeckte Sacheinlage' (2000) 55 *Juristenzeitung (JZ)* 442; see already Friedrich Kessler, 'Die soziale Funktion des Vertrages zugunsten Dritter' in K Müller and H Soell (eds), *Rechtswissenschaft und Gesetzgebung Festschrift für Eduard Wahl zum siebzigsten Geburtstag* (Carl Winter Universitätsverlag, 1973); see also Marc Amstutz, 'The Constitution of Contractual Networks' in M Amstutz and G Teubner (eds), *Networks Legal Issues of Multilateral Co-operation* (Hart Publishing, 2009).

<sup>164</sup> See, Report of the (First) Government Commission Corporate Governance, chaired by Professor Theodor Baums, section B.

While the Code commission<sup>165</sup> was made up only of private actors, ie representatives of large firms or academic institutions, the Commission's personnel might also not entirely provide the answer to the question as to whether any of these commissions is furnished with the proper competence to enact binding law. More importantly, then, is the nature of the Commission's empanneling. Where the Commission is convened upon the initiative and request by the government, there is indeed considerable reason to qualify it to be more 'public' in nature than if it were upon the initiative of a commercial actor, such as a bank or another private interest group.<sup>166</sup>

After the preceding discussion, we are likely to still feel unsatisfied with an ultimately inconclusive attempt at answering the question regarding the Code's legal nature with regard to the constitution of the drafting Commission. The result, however, we suggest, was entirely predictable if not inevitable, given the starting premises. If anything, this discussion has begun to illustrate the inadequacy of the public/private distinction to capture what we have in Chapter 2 referred to as the paradoxical constitution of transnational law making. In the following section, we will further explain the inadequacy of the attempt to explain the legal nature of the Code through a designation of its norms or its authors as either public *or* private.

## **2. Corporate Law Making Between State and Society**

The discussion of the rise of governance in contemporary law making reflects a wide-ranging interest, but also a high level of concern with what is being perceived as a 'privatisation of law'.<sup>167</sup> As Colin Scott recently noted: "...recognition of private legislation reflects both a desire to better understand the diffuse nature of capacities underpinning regulatory and wider governance practices and a concern respecting the legitimacy of such non-governmental rule making."<sup>168</sup> This combination of 'desire' and

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<sup>165</sup> See, Martin Wolf, 'Corporate Governance. Der Import angelsächsischer "Self-Regulation" im Widerstreit zum deutschen Parlamentsvorbehalt' (2002) 35 *Zeitschrift für Rechtspolitik (ZRP)* 59, p. 59 note 3; see the list of members of the (Second) Government Commission Corporate Governance, chaired by Dr. Gerhard Cromme, available at: <http://www.corporate-governance-code.de/eng/mitglieder/index.html> (27 July 2006); See the Code at: [http://www.corporate-governance-code.de/eng/download/CorGov\\_Endfassung\\_E.pdf](http://www.corporate-governance-code.de/eng/download/CorGov_Endfassung_E.pdf) (27 July 2006).

<sup>166</sup> Latter examples include the code commissions for the Deutsche Bank, the 'Berliner Initiativkreis' and the 'Frankfurt Commission', all mentioned in Martin Peltzer, 'Corporate Governance Codices als zusätzliche Pflichtenbestimmung für den Aufsichtsrat' (2002) 5 *Neue Zeitschrift für Gesellschaftsrecht [NZG]* 10, at 11.

<sup>167</sup> See the survey by Johannes Köndgen, 'Privatisierung des Rechts. Private Governance zwischen Deregulierung und Rekonstitutionalisierung' (2006) 206 *Archiv für die zivilistische Praxis [AcP]* 477.

<sup>168</sup> Colin Scott, 'Regulating private legislation' in F Cafaggi and H Muir-Watt (eds), *Making European Law Governance Design* (Edward Elgar, 2008), 254.

‘concern’ originates from a persisting association of law and its creation with the public, state sphere, while informal and private ordering remains relegated to the private, market realm. Central to our analysis up to this point was an argument against this dualistic distinction, which is inadequate to grasp the ways in which both hybrid and private forms of norm generation can produce norms with regulatory functions. In concluding this section on corporate governance codes, it is time to draw out the context in which this hybrid law making occurs, a context which is both ‘real’, that is consisting of actors, and conceptual, meaning that it at the same time a particular, methodological reflection on the way that norms are being created in such areas today.

#### **IV. Corporate Governance and the Intricacies of Rough Consensus and Running Code**

The example of the German Corporate Governance Code illustrates this particular approach, which Graf Calliess and I have been conceptualizing as *Rough Consensus and Running Code* [RCRC]<sup>169</sup>, in the following way. The German government, facing immense domestic and international pressure to reform its corporate law regime so as to make German companies more attractive for global investors, was aware of the reform obstacles existing in the contemporary German political economy. At the same time, the government was well aware of the potential of societal (‘market’) self-regulation, as was declared by the Ministry of Justice at the occasion of being presented with the Commission’s Corporate Governance Code in February 2002. Furthermore, the German government was hardly taking a revolutionary step when inviting a Commission to draft this instrument. Even if the legislative project of drafting a national civil code in the latter part of the nineteenth century was of course in many ways different to the drafting of the Corporate Governance Code in 2002, the Schröder government’s initiation of the Commission, which was markedly referred to as a ‘Government Commission’, also bears some important resemblances to its historical forerunner. In both instances, the government drew on private expert knowledge in preparing a comprehensive legislative instrument, the regulatory impact of which was perceived as being so large that its delegation to a commission of experts promised to channel otherwise conflicting and perhaps irresolvable positions through a discursive, outcome-oriented process. Certainly, the government’s initiation of this norm-generation process remained ambivalent at best with regard to the legal nature of the Code growing out of the commission’s work. The striking characteristic of both the process of the Code’s drafting and of the Code itself remains, it seems, its *hybrid* nature between a non-

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<sup>169</sup> Graf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart Publishing, 2010).

binding, voluntary, ‘private’ regulatory instrument on the one hand and a document, linked to a statutory disclosure obligation by a federal law, on the other. Yet, neither dimension adequately depicts the dynamics that shape the emergence of the idea of a Code, the evolution of its drafting, the intriguingly open-ended nature of the discussion around the legal nature of both the norms of the Code as of the Code itself. Instead, the discussion has made it clear that the repeated attempts to solve this mystery by effectively avoiding the question ‘public’ or ‘private’ through designating the Code as *hybrid* and by referring to its norms as ‘soft law’, achieves just that, namely to avoid the underlying conundrum of how to integrate such governance processes into our legal theoretical methodology and doctrine. This, then, makes the example of the German Corporate Governance Code particularly intriguing because its coming into being is reflective of both its embeddedness in a complex, historically evolved political economy that was historically skeptical with regard to private law making and market ordering<sup>170</sup> and a fast-evolving transnational regulatory landscape in which public and private actors – as ‘norm entrepreneurs’ not only compete in striving to make ‘better rules’ but in a much richer fashion overlap, intertwine, collaborate and antagonize, thereby contributing to a constantly changing space that Saskia Sassen has referred to as both institutional *and* normative.

The concept of Rough Consensus and Running Code seeks to capture the particular tension between multipolar, formal/informal processes of deliberation and consensus-seeking on the one hand and the emergence of regulatory instruments with experimental and adaptable character on the other. Central to this approach is the emphasis on the inseparability of elementary features in theories of social order, which are traditionally defined through distinctions. Examples include, foremost, the distinction between public and private or between state and market, but also – as regards the ‘function’ of a norm, between coordination and regulation.<sup>171</sup> The RCRC model seeks to capture the particular tension inherent to norm generating processes where the nature of the particular issue does not easily lend itself to an association with only one of these elements. The evolving norms and the processes of their generation in sensitive regulatory areas defy a categorization of either public or private, coordinative or

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<sup>170</sup> See Hans Großmann-Doerth, 'Selbstgeschaffenes Recht der Wirtschaft und staatliches Recht [1933]' in U Blau-rock, N Goldschmidt and A Hollerbach (eds), *Das selbstgeschaffene Recht der Wirtschaft Zum Gedenken an Hans Großmann-Doerth (1894-1944)* (Mohr Siebeck, 2005); Dieter Hart, 'Zur konzeptionellen Entwicklung des Vertragsrechts' (1984) 29 *Die Aktiengesellschaft (AG)* 66.

<sup>171</sup> See Gillian Hadfield, 'The Public and the Private in the Provision of Law for Global Services' in V Gessner (ed) *Contractual Certainty in International Trade Empirical Studies and Theoretical Debates on Institutional Support for Global Economic Exchanges* (Hart Publishing, 2009).

regulative. As a result, their classification as either ‘law’ or ‘non-law’ depending on their origin in a recognized, competent law-making authority is as problematic as is the declaration that a norm constitutes a merely ‘private’ arrangement or, ‘social norm’. RCRC, thus, problematizes the tension between the definition of a norm’s legitimacy as law or non-law with reference to whether or not it emanated from an ‘official’ law-making authority on the one hand and as to whether the legitimacy of norms should be measured in light of the input into their creation by those ‘affected’ by the norm, on the other. As we have tried to show with regard to a number of fast-evolving regulatory areas in both contract and corporate law, the particular dynamics of norm-creation in sensitive societal areas characterized by a hybrid combination of official and unofficial actors and a high degree of experimental, tentative, reflexive regulation, suggest the impossibility to associate such processes with only one of the identified sides.

From this perspective, the transnational regulatory landscape of corporate governance is marked by the intricate collision of public, private and hybrid, ceaselessly evolving norm making processes that arise between regulatory arenas populated by actors inside and outside of the nation state. These norm making processes are complex in the sense that the identification of either coordinative (facilitating) or regulatory (redistributing) functions can no longer occur on the basis of distinguishing between the public or private nature of the actors involved. Instead, the norm making processes have to be seen as *law generating* when and where we are willing to recognize the inseparability of the coordinative/regulatory dimension from the authority/affectedness dimension of these processes.

Against this background, what can be learned from this example for other contemporary forms of law making? Recognizing a growing interest among legal scholars in the origins and prospects of what is conventionally referred to as a ‘privatisation of law’<sup>172</sup>, it is necessary to emphasize that the *regulatory* function of the Code does not follow from the state’s enactment of a statutory disclosure obligation, as was repeatedly argued by those identifying the Code as a public regulatory instrument. What constitutes an unsatisfactory answer to the question whether or not the Code is law, resulted from the recognition that in fact not only the underlying drafting process but also the envisioned enforcement mechanism are intriguingly complex and arguably open-ended for a reason. The government did not make the Code directly or indirectly enforceable, when it enacted the disclosure requirement, as it did not itself enact an ultimately effective sanctioning mechanism for the case of non-disclosure or deficient

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<sup>172</sup> Johannes Köndgen, 'Privatisierung des Rechts. *Private Governance* zwischen Deregulierung und Rekonstitutionalisierung' (2006) 206 *Archiv für die civilistische Praxis [AcP]* 477; Georg Borges, 'Selbstregulierung im Gesellschaftsrecht - zur Bindung an Corporate Governance-Kodices' (2003) 32 *ZGR* 508.



disclosure. Instead, the government's action in this regard illustrates a particular set of features that characterize law making in the area of corporate governance and many other regulatory areas today. The Code can only fulfil its function of influencing corporate behavior and, as such, rendering German corporations more competitive, if a sufficient number of market participants endorse the Code's rules to make them matter. In that sense, a *rough consensus* regarding the Code's normative obligations must exist for it to have any influence on the corporate landscape. This rough consensus must not encompass each and every of the Code's recommendations or, perhaps even lesser, its suggestions. Instead, it suffices that there is among market participants a far reaching agreement – a rough consensus – as to the binding quality of the Code's content. That this is the case, has been verified by a number of empirical studies since its publication.<sup>173</sup> Secondly, the particular quality of the Code's three-pronged regulatory nature of information (restatements), recommendations and suggestions in connection with the statutory disclosure requirements for recommendations leads to a complex constellation of the Code's regulatory impact. Where a rough consensus is being attained, it might set into motion the generation and crystallisation of a *customary law* of corporate governance norms, namely with the passage of time and an increasing acceptance of the Code among market participants. With the crystallisation of certain corporate governance rules, parts of the law of corporate governance can develop into a regime which can further develop and solidify in the future. In light of such an incremental growth of norms through piloting (drafting a code), implementing (publishing it) and enforcing them (through a communication obligation set by the state on the one hand, and a market shaming process on the other), the Code can contribute to the growth of a corporate governance regime, which can become ever more comprehensive, while at the same time being more flexible, open and adaptive to changes than a statutory provision would be.

Seen in this light, the Code is illustrative of how recommendations can be made to enter a regulatory realm, which is occupied by both public and private norm-entrepreneurs, including the state that is pursuing corporate law reform, and private actors such as banks, investments funds and expert groups who are calling for new rules governing corporate conduct but also other stakeholders such as unions and business ethics propagators. From this perspective, the Code denotes how recommendations can

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<sup>173</sup> Axel von Werder, Till Talauciar and Georg L. Kolat, 'Kodex Report 2003: Die Akzeptanz der Empfehlungen des Deutschen Corporate Governance Kodex' (2003) 56 *Der Betrieb* 1857; Peter Oser, Christian Orth and Dominic Wader, 'Die Umsetzung des Deutschen Corporate Governance Kodex in der Praxis' (2003) 56 *DB* 1337; Jürgen van Kann and Mira Eigler, 'Aktuelle Neuerungen des Corporate Governance Kodex' (2007) *Deutsche Zeitschrift für Steuerrecht* 1730.

increasingly be recognised as ‘rules to be followed’, long before they may grow into widely accepted norms of ‘good governance’. That the latter is not oriented towards a reductionist concept of market efficiency, is maintained by connecting the coordinative/regulatory dimension with that of authority/affectedness. It is against this background, then, that we need to not only return again to the original question of whether the Code is law, but also to dare asking whether we have been asking the right question.

As suggested, the perspective taken vis-à-vis reform issues related to corporate governance has been informed by both a public-private, official-non-official distinction between law and non-law on the one hand and a deeply felt skepticism about the chances for the law reform of historically grown, path-dependent norms and institutions, not only in ‘Germany Incorporated’<sup>174</sup>, on the other. And, indeed, the legacies with which we have been struggling, are weighty. In contrast to the the institutional and methodological side of norm setting and law making in the context of increasingly ‘privatised’ law making forms, most contemporary commentators of corporate law reform have not yet begun to embrace such a perspective. As it stands, law reform continues to be conceptualised largely with regard to a dualistic perception of state regulation and ‘intervention’ on the one hand and market order and self-regulation on the other. Traditionally, the German choice was thus: ‘To regulate or not to regulate’. And, the traditional answer was, indeed, to regulate.<sup>175</sup> The realm of options for the protection of shareholders’ interests have thus been perceived to range from coercive,

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<sup>174</sup> Peter A. Hall and David Soskice, 'An Introduction to Varieties of Capitalism' in PA Hall and D Soskice (eds), *Varieties of Capitalism The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001).

<sup>175</sup> See, hereto the brilliant account by Gerald Spindler, 'Deregulierung des Aktienrechts?' (1998) 43 *Die Aktiengesellschaft (AG)* 53, 53 ff., 57, stressing the different approach taken by American corporate law, which - for the most part - is state law, which is, in turn, ‘enabling’ law, giving firms great discretion in designing their governing law. ‘Corporate law’ as such, then, serves for one as framework providing default rules, while it does, on federal level, contain a considerable number of binding rules pertaining to safeguard investors’s interest and the trust in the capital market; Peter Ulmer, 'Der deutsche Corporate Governance Kodex - ein neues Regulierungsinstrument für börsennotierte Aktiengesellschaften' (2002) 166 *ZHR* 150, 178 f., contemplating the code’s allegedly meager achievements as to further de-regulate corporate law; but see Jeffrey N. Gordon, 'Pathways to Corporate Governance ? Two Steps on the Road to Shareholder Capitalism in Germany' (1999) 5 *Columbia Journal of European Law* 219, see also, Werner F. Ebke, 'Die Zukunft der Rechtsetzung in multijurisdiktionalen Rechtsordnungen: Wettbewerb der Rechtsordnungen oder zentrale Regelungsvorgabe - am Beispiel des Gesellschafts- und Unternehmensrechts' in CJ Meier-Schatz (ed) *Die Zukunft des Rechts* (Helbing & Lichtenhahn, 1998), 109-112.

binding law ('vested rights') to an approach of entrusting this protection to the capital market. In the latter extreme, the shareholder's position as that of a rightsholder in a corporation would basically be seen as a tradable asset, the value of which would be determined by the market, not by 'the law'.<sup>176</sup> There is, certainly, much more to be said to this set of alternatives, and the dramatic substitution of post-*Enron* corporate governance reform<sup>177</sup> by an overwhelming task to come to terms with the current financial and economic crisis underscores the dimensions of the task faced.

But it is against this background that - on both sides of the Atlantic - the search for 'good governance' in company law will continue. It will do so by involving the wide range of public, private and hybrid law making forms which we have increasingly grown accustomed to. For this, valuable lessons can be drawn from earlier examples of commercial self-regulation (e.g. standard contracts), as well as from other, contemporary developments in other fields (environmental law, commercial arbitration<sup>178</sup>). The rich spectrum of experiences on the national, European and international level is reflective of an on-going search for ways to adequately mobilise societal knowledge while being aware and conscious of divergent national trajectories of socio-legal and economic development. The enactment of the Corporate Governance Code and the installation and indeed highly effective continuation of a 'standing commission' to review its acceptance and the need of amendments are both illustrations of a change in approaching law reform in a politically highly contested area. At the same time, the development of codes, in Germany as in many other countries around the world, by private and public actors, both domestically and transnationally, gives testimony of an emerging legal regime that can no longer adequately be relegated to either a state or market realm. Instead, the emerging regime of a transnational law of corporate governance is characterised by its 'spatial' character, both with regard to its normative scope and its institutional origin.

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<sup>176</sup> Gerald Spindler, 'Deregulierung des Aktienrechts?' (1998) 43 *Die Aktiengesellschaft (AG)* 53, at 59.

<sup>177</sup> Interestingly, commentators were quick to point out the futility of premature European triumphancy with regard to the events in corporate America at the time of Enron and WorldCom's collapse: see, *The Economist*, 13 July 2002, 54, denouncing any pride in 'Europe's gentle form of Capitalism' in light (or shadow, for that matter) of highly disputable governmental interventions at the side of falling corporate giants.

<sup>178</sup> See, hereto Filip De Ly, 'Lex Mercatoria (New Law Merchant): Globalisation and International Self-Regulation' in V Gessner, RP Appelbaum and WF Felstiner (eds), *Rules and Networks The Legal Culture of Global Business Transactions* (Hart Publishing, 2001), 159 ff.; Peer Zumbansen, 'Piercing the Legal Veil: Commercial Arbitration and Transnational Law' (2002) 8 *European Law Journal* 400.

As corporate governance scholarship continues to sharpen its lens for deeper structures of formal/informal norm-creation and the particular socio-economic cultures<sup>179</sup> in which different hybrid regulatory approaches emerge, it becomes evident to which degree ‘comparative corporate governance’<sup>180</sup> is being transformed into a inter-disciplinary area of regulatory analysis. Our focus on the way in which corporate governance principles are migrating in between different national political economies on the one hand and emerging, constantly reshaping regulatory spaces, for which Marc Amstutz has poignantly used the term of ‘interlegality’<sup>181</sup>, on the other, informs and accentuates our perceptions not only for the existing *differences* in national corporate laws, but more importantly for the fact that conventionally viewed ‘national corporate governance systems’ have long become transnationally constituted spaces of institutional and normative interaction and contestation. They are, thus, anything than peaceful, embedded legal orders. Instead, they are marked by a fundamental regulatory transformation in which social norms and ‘soft law’ become intertwined, changed, adapted and interwoven within a regulatory environment which itself is no longer stable.

The case of corporate governance reform, which we studied in this paper, illustrates the degree to which the contested issues and the successively made proposals that grew out of a far-reaching and open-eyed gathering of information and evidence by national and supra-national policy makers, expert committees and scholars were of a veritable *transnational* nature, emerging from parallel reform efforts in other countries, among private and non-state actors around the world. In that sense<sup>182</sup>, domestic company law reform must be seen as part of an emerging transnational legal pluralism. Its defining feature is the fundamental contestation of the very distinction that legal pluralism has always struggled with: that between law and non-law.

## E. CONCLUSION

Corporate governance norms provide a telling example of the transformation of traditional state-originating, official norm-setting in favour of increasingly de-centralised,

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<sup>179</sup> See only Amir N. Licht, 'The Mother of all Path-Dependencies: Towards a Cross-Cultural Theory of Corporate Governance Systems' (2001) 26 *Delaware Journal of Corporate Law* 147.

<sup>180</sup> Mark J. Roe, 'Comparative corporate governance' in P Newman (ed) *The New Palgrave Dictionary of Economics and the Law* (Palgrave Macmillan, 1998)

<sup>181</sup> Marc Amstutz, 'In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning' (2005) 11 *European Law Journal* 766; see also Marc Amstutz and Vagias Karavas, 'Rechtsmutation: Zu Genese und Evolution des Rechts im transnationalen Raum' (2006) *Rechtshistorisches Journal* 14.

<sup>182</sup> Referring to examples of transnational human rights litigation, see hereto Robert Wai, 'Transnational Private Law and Private Ordering in Contested Global Society' (2005) 46 *Harvard International Law Journal* 471, 475-476.

multi-level processes of norm production. At the same time, not only are norms produced on more levels; the nature of these norms themselves changes dramatically. What the foregoing assessment of the present trajectories of transnational corporate governance (including the case study of Germany's efforts as regards corporate governance reform) illuminated is the particular nature of the regulation of business conduct and corporations in globally interdependent activity spheres (marketisation), fundamentally changing national political economies (privatisation) and a dramatic expansion of issue-driven, functionalist regulatory regimes (scientisation).<sup>183</sup> This constellation, however, suggests nothing less than a fundamental contestation and erosion of boundaries between state and non-state actors, between official and unofficial law, between public and private ordering.<sup>184</sup> What is important at this point is to repeat the observation made earlier, that the novelty of this blurring of boundaries between traditional norm-creating and –executing spheres appears as a direct result of a specific historical experience of a particular framework of socio-economic, political-legal regulation that characterised the 20<sup>th</sup> rise of the Social and Welfare State.<sup>185</sup> This experience has been aptly identified and premeditated by turn-of-the-century sociologists and lawyers, and powerfully captured by Max Weber's sobering assessment of the disenchantment of modernity.<sup>186</sup> Irre-

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<sup>183</sup> For an excellent demarcation of these dimensions, see Gili S. Drori and John W. Meyer, 'Scientization: Making a World safe for organizing' in M-L Djelic and K Sahlin-Andersson (eds), *Transnational Governance Institutional Dynamics of Regulation* (Cambridge University Press, 2006).

<sup>184</sup> See e.g. Volkmar Gessner, Richard P. Appelbaum and William F. Felstiner, 'Introduction: The Legal Culture of Global Business Transactions' in V Gessner, RP Appelbaum and WF Felstiner (eds), *Rules and Networks: The Legal Culture of Global Business Transactions* (Hart Publishing, 2001); Francis Snyder, Economic Globalisation and the Law in the 21<sup>st</sup> Century, in: *The Blackwell Companion to Law and Society* (2003); Katharina Pistor, 'Of Legal Transplants, Legal Irritants, and Economic Development' in P Cornelius and B Kogut (eds), *Corporate Governance and Capital Flows in a Global Economy* (Oxford University Press, 2003).

<sup>185</sup> Niklas Luhmann, *Political Theory in the Welfare State [1981, transl. by John Bednarz Jr.]* (Walter de Gruyter, 1990); Michael Stolleis, 'Die Entstehung des Interventionsstaates und das öffentliche Recht' (1989) 11 ZNR 129.

<sup>186</sup> Max Weber, *The Protestant Ethics and the Spirit of Capitalism (1904/05, Talcott Parsons transl.)* (Charles Scribner's Sons, 1930); Max Weber, *On Law in Economy and Society (transl. from the German Wirtschaft und Gesellschaft, 2nd ed., 1925, by E.Shils and M.Rheinstein, edited/annotated by M.Rheinstein)* (Simon Schuster, 1967); David Trubek, 'Max Weber on Law and the Rise of Capitalism' (1972) *Wisconsin Law Review* 720; Rudolf Wiethölter, 'Proceduralization of the Category of Law' in C Joerges and D Trubek (eds), *Critical Legal Thought: An American-German Debate* (Nomos, 1985); Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Society Review* 239; Galf-Peter Calliess, *Prozedurales Recht* (Nomos, 1999); Peer Zumbansen, *Ordnungsmuster im modernen Wohlfahrtsstaat. Lernerfahrungen zwischen Staat, Gesellschaft und Vertrag* (Nomos, 2000).

deemably thrown into the iron cage of modern rationalisation<sup>187</sup>, contemporary hopes are pinned – if at all – on a transformative realisation of emerging self-regulatory potentials.<sup>188</sup> It is against this narrative, that I see current attempts to rethink legal regulation as ‘regulatory governance’, ‘regulatory capitalism’, or ‘rough consensus and running code’.

The framework of transnational corporate governance regulation can only be understood against the background and in light of the complex, intertwined nature of corporate governance regulation as it unfolds in a context marked by tensions between national and, for example, European aspirations for market competitiveness, market and polity integration dynamics and the increasingly transnational nature of firm’s operations and regulations. A viable theory of transnational law making must seek to acknowledge these contextual tensions and acknowledge the various learning experiences with regard to market regulation in order to productively integrate them into an enriched concept of regulatory governance. Such a theory might then be able to capture the particular dynamics of transnational corporate governance regulation through its structuring capacities of distinguishing between the substantive and procedural dimensions of contemporary norm-creation. The particular promise of a theory such as RCRC here lies in its capacity to draw conceptual lines between the experimentation with norm-creating processes, which are understood as contextualised learning processes (‘rough consensus’) on the one hand, and the assessment of emerging normative bodies on the other (‘running code’). The promise of RCRC lies in its sensitivity with regard to knowledge emanating from concrete regulatory contexts that are recognized as norm proposals. Within the process of disseminating such norm proposals, they are gradually evolving into programs of regulation. Emerging into a still evolving running code, such norm programs remain fully assessable from any factual or normative standpoint, while not sacrificing their ongoing regulatory function. As such, this model strives – not unlike competing governance concepts – for coherence, applicability and, ultimately, legitimacy.

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<sup>187</sup> Richard Sennett, *The Culture of the New Capitalism* (Yale University Press, 2006).

<sup>188</sup> Jean Cohen and Charles F. Sabel, 'Directly-deliberative polyarchy' (1997) 3 *European Law Journal* 313; Oliver Gerstenberg, 'Law's Polyarchy: A Comment on Cohen and Sabel' (1997) 3 *European Law Journal* 343.

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